Supreme Court, U.S.
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No. 03-1384

IN THE

Supreme Court of the United States

CHERYL JANE FOLLOWELL,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
BETTY JEAN GURLEY,
Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federal bankruptcy court may utilize the doctrine of res judicata to avoid addressing factual disputes and summarily disallow a claim by a non-debtor spouse for the value of her separate ownership interest in property which is included in the debtor's bankruptcy estate pursuant to 11 U.S.C. § 541 thereby unlawfully taking the non-debtor spouse's property.

Whether the plain language of 11 U.S.C. § 502(h) permits the transferee of property to assert a claim against a debtor's estate for the value of her independent interest in the property received when the transferred property is later recovered by a bankruptcy trustee?

PARTIES TO THE PROCEEDING

There are no parties other than the ones named in the caption. There were no other parties in the proceedings below, however, Betty Jean Gurley died after the filing of the notice of appeal and prior to the filing of the briefs in the Eleventh Circuit. Pursuant to FED. R. APP. P. 43(a)(1), Cheryl Followell, executrix for the Estate of Betty Jean Gurley, was substituted as the Appellant in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Followell, as executrix for the estate of Betty Jean Gurley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) was entered December 31, 2003, and is not reported. The order of the United States District Court for the Middle District of Florida, Ocala Division (App. 4a-5a) was entered on February 27, 2003, and is not reported. The Memorandum Opinion and

Judgment of the United States Bankruptcy Court for the Middle District of Florida (App. 31a-50a) were entered on December 27, 2001 and are not reported.

JURISDICTION

The opinion and final judgment of the court of appeals were entered December 31, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§101(10)(B), 502(h) 541 and 550 are reprinted in App. 51a-61a.

STATEMENT OF THE CASE

1. William Gurley (the "Debtor") filed a voluntary chapter 7 petition under the United States Bankruptcy Code on July 26, 1995, in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division (the "Florida Bankruptcy Court"). App. 33a. On April 26, 1996, George E. Mills, Jr., the Trustee in the chapter 7 case (the "Trustee"), commenced an adversary proceeding seeking to recover certain allegedly fraudulent transfers under the Florida Uniform Fraudulent Transfer Act, the Federal Debt Collection Procedures Act, and the Bankruptcy Code, 11 U.S.C. §§ 541 (a) and 544(b) (the "Transfer Case"). *Id.* The transfers in question were made in 1989, according to the Debtor's testimony, for "estate planning purposes." App. 15a.

In 1989, when the transfers at issue commenced, Mrs. Gurley personally held between $7 and $8 million in her own assets. App. 8a. A large portion of the assets transferred to Mrs. Gurley was real property in which she held a survivorship interest separate and apart from the interest transferred to her by the Debtor in and after 1989. App. 10a.

The Florida Bankruptcy Court in the Transfer Case held that despite the apparent transfer the Debtor continued to hold an equitable in interest in the property transferred to Mrs. Gurley and thus "[a]ll property transferred by the Debtor to his wife is property of the estate pursuant to 11 U.S.C. § 541(a)(1)."[1] App. 29a. The Florida Bankruptcy Court in the Transfer Case included all property held by Mrs. Gurley—including the $7 to $8 million in her own assets and her own survivorship interest in the real property—in her husband's bankruptcy estate. App. 30a.

2. Mrs. Gurley appealed the Florida Bankruptcy Court's decision in the Transfer Case contending that the transfers were valid transfers and that the statute of limitations for commencing the Transfer Case barred the Trustee's recovery. The Florida Bankruptcy Court's decision in the Transfer Case was affirmed by the Eleventh Circuit in an unpublished decision and this Court denied certiorari. *See Gurley v. Mills*, 532 U.S. 1009, 121 S. Ct. 1736 (Mem.), 149 L. Ed.2d 660 (2001).

3. As a result of the breadth of the bankruptcy court's Memorandum Opinion, Amended Judgment and Amended Permanent Injunction entered in the Transfer Case, Mrs. Gurley was forced to file a voluntary chapter 11 bankruptcy petition on October 22, 1997, in the United States Bankruptcy Court for the Western District of Tennessee (the "Tennessee Bankruptcy Court"). Mrs. Gurley immediately filed an adversary proceeding in the Tennessee Bankruptcy Court

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[1] The Florida Bankruptcy Court also held, with respect to a proprietorship known as Moltan Company, that the Debtor had failed to effectively deliver a deed of gift to Mrs. Gurley or to possess the requisite donative intent for a valid transfer of the assets. App. 29a. The deed of gift only purported to transfer certain personal property associated with the proprietorship, since all real property associated with the business had been separately transferred by validly executed, delivered and recorded deeds.

under 11 U.S.C. § 542 (the "Turnover Case") seeking a turnover of assets claimed by the Trustee to be only William M. Gurley's property and not property of Mrs. Gurley's bankruptcy estate. *See generally, In re Gurley*, 222 B.R. 124, 128-30 (Bankr. W.D. Tenn. 1998). The Trustee's argument in the Turnover Case was that the assets in question were "not property of this [Mrs. Gurley's chapter 11] estate based upon the Amended Judgment entered by Judge Briskman, or in the alternative that the Debtor [Mrs. Gurley] holds only bare legal title to the assets. . . ."[2] *Id.* at 131.

The Tennessee Bankruptcy Court, affording great deference to the Florida Bankruptcy Court's decisions,[3] nevertheless held that "[e]ach of the assets which was the subject of Judge Briskman's Amended Judgment [in the Transfer Case] *is property of the Debtor's* [Mrs. Gurley's] *estate*. *Id.* at 145 (emphasis added). Thus, the Tennessee Bankruptcy Court necessarily found that Mrs. Gurley also held interests in the same property under 11 U.S.C. § 541(a)(1).[4] The Trustee appealed from this decision but later dismissed his appeal.

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[2] In fact, the Trustee also contended in the Turnover Case that Mrs. Gurley, as the recipient of fraudulently transferred property, was limited to filing a claim under § 502(h) in her husband's chapter case. Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 21 (Feb. 26, 1998).

[3] The Honorable Judge Jennie D. Latta, U.S. Bankruptcy Judge, Western District of Tennessee, specifically stated "[t]his Court will not consider issues decided by Judge Briskman [The Honorable Arthur B. Briskman, U.S. Bankruptcy Judge, Middle District of Florida], but rather will determine what effect shall be given to Judge Briskman's order in light of the petition filed by Mrs. Gurley." 222 B.R. at 130.

[4] Judge Latta intimates that Mrs. Gurley's interests are ownership interests when she found that "[t]here is no reason to believe that the transfers between Mr. Gurley and his wife were ineffective as between them." 222 B.R. at 139 (citing *Todkill v. Todkill*, 88 Nev. 231, 237, 495 P.2d 629, 632 (1972)(When a husband transfers title to separate property

Mrs. Gurley's chapter 11 case resulted in a confirmed plan of reorganization and was closed by Final Decree entered February 11, 2000. Mrs. Gurley paid to William M. Gurley's bankruptcy estate in excess of $23 million.[5] This sum represents the entire value of all the assets found to be fraudulently transferred and the entire value of the real and personal property in which both Mrs. Gurley and the Debtor held an interest, including the Moltan Company proprietorship.

The Tennessee Bankruptcy Court decided that it would value the Trustee's claim against Mrs. Gurley by applying values to various assets which the Florida Bankruptcy Court found had been improperly transferred. 222 B.R. at 145.

4. Mrs. Gurley filed Claim No. 4 on October 15, 1997, in the amount of $11,070,280.00 plus the unliquidated value of other assets. Claim No. 4 was amended on October 23, 1998 (Claim No. 8), and again on October 19, 1999 (Claim No. 9). App. 35a. The essence of Claim No. 9 is twofold. First, it is Mrs. Gurley's claim under § 502(h) of the Bankruptcy Code for the value of the assets she returned to her husband's estate. App. 35a-36a. It also represents the claim for the value of Mrs. Gurley's independent ownership interest in property which the Florida Bankruptcy Court included in her husband's estate and for which she paid the full value of to the Trustee. App. 36a.

5. The Trustee filed an objection to Mrs. Gurley's claim followed by a motion for summary judgment. App. 36a-39a. Mrs. Gurley, at the Florida Bankruptcy Court's direction,

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from his name to his wife's name, he is presumed to intend a gift to her, even though his original intent was to defraud creditors); *Burnham v. Burnham*, 343 So. 2d 639, 640 (Fla. Dist. Ct. App. 1977); and *Kinkead v. State*, 202 Tenn. 164, 168, 303 S.W. 2d 713, 715 (1957)).

[5] In fact, Mrs. Gurley paid the Trustee and all creditors one hundred per cent (100%) of their allowed claims with interest in less than three (2) years from the date of confirmation.

submitted Statements of Disputed Issues of Fact Requiring Resolution as to Claim No. 9 (the "Statement"). In the Statement, Mrs. Gurley succinctly demonstrated the disputed issues of fact and the proof to be submitted in connection with each disputed issue. Namely, proof as to the value of Mrs. Gurley's interest in the assets transferred to the Debtor's estate. The Trustee submitted proposed findings of fact and conclusions of law. The Florida Bankruptcy Court, adopting virtually verbatim the Trustee's proposed findings of fact and conclusions of law, disregarded the disputed issues of fact and held that it had already decided that Mrs. Gurley held no interest in the assets in question and, as such, could assert no claim under 11 U.S.C. § 502(h) for having returned the value of the assets to the Debtor's estate. App. 49a.

6. The Eleventh Circuit affirmed the Florida Bankruptcy Court's decision holding (i) that "the doctrines of res judicata and collateral estoppel bar relitigation" of the issues decided by the Florida Bankruptcy Court and the Tennessee Bankruptcy Court (App. at 3a) and (ii) that the Florida Bankruptcy Court "properly interpreted § 502(h)" in finding that "Mrs. Gurley did not have a prepetition claim against her husband." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for a writ of certiorari because the Eleventh Circuit Court of appeals has decided an important question of federal bankruptcy law that (i) on the issue of res judicata, conflicts with this Court's decisions in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed.2d 454 (2003); *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed.2d 767 (1979) and *Federated Dep't Stores, Inc. v. Moitie*, 452, U.S. 394, 398, 101 S. Ct. 2424, 2438, 69 L. Ed.2d 103 (1981); and (ii) on the issue of the allowance of a claim under 11 U.S.C. § 502(h), has not been, but should be, settled by this Court.

Res Judicata Issue.

The Florida Bankruptcy Court in the Transfer Case found that all property transferred by the Debtor to Mrs. Gurley was property of his bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). App. 29a. The Florida Bankruptcy Court in this same opinion also found that Mrs. Gurley owned assets totaling $7,005,700.00 in December 1988 and held interests in property owned as tenants by the entirety prior to any transfers from her husband. App. 8a.

In Mrs. Gurley's chapter 11 case, the Tennessee Bankruptcy Court held that Mrs. Gurley had interests in these same assets and that they were also property of her bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). *In re Gurley*, 222 B.R. 124, 138-39 (Bankr. W.D. Tenn. 1998). The Tennessee Bankruptcy Court later confirmed Mrs. Gurley's plan providing for the transfer of one hundred percent (100%) of the value of these assets to Mr. Gurley's chapter 7 trustee. This was done with the knowledge that Mrs. Gurley had a claim pending in the Florida Bankruptcy Court for the value of her interest being transferred to the chapter 7 estate.[6] *Id.* Mrs. Gurley's seeks allowance of her claim for the proportionate value of her interest in the assets transferred to her husband's chapter 7 estate.

Without doubt, each Bankruptcy Court has determined that both Mr. and Mrs. Gurley hold an interest in property that constitutes property of each spouse's respective bankruptcy estates pursuant to § 541(a). No court, however, has ever adjudicated the relative interest of each spouse in these assets. The Florida Bankruptcy Court found that Mr. Gurley held an interest in all property transferred to his wife but did not

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[6] This is self evident given that Claim Number 4 was filed almost an entire year prior to confirmation of Mrs. Gurley's plan. Moreover, Mrs. Gurley's plan expressly addressed and preserved her continuing interest in assets of and claims against her husband's chapter 7 estate.

quantify the extent of his interest or Mrs. Gurley's interest—it merely ordered the assets returned. The Tennessee Bankruptcy Court held that Mrs. Gurley also held an interest in this same property but, likewise, did not quantify the extent of her interest. Rather, it valued the assets the Florida Bankruptcy Court ordered to be returned. These two decisions are not inconsistent, irreconcilable or incompatible.

The lower courts however have ignored this Court's decisions on res judicata and used the doctrine to avoid addressing the fundamental factual disputes concerning the value of the relative ownership interests of the two (2) spouses in property in which each holds an interest. In so doing, the lower courts have created a mechanism whereby a bankruptcy trustee may strip a non-debtor spouse of the value of her interest in jointly owned property. Simply stated, the lower courts have summarily extinguished Mrs. Gurley's ownership interests in property without any compensation—even in the form of an unsecured claim against her husband's chapter 7 estate.[7]

This Court's decisions on the doctrine of res judicata in bankruptcy matters generally hold that "[a] final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed.2d 767 (1979)(quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. E.d.2d 210 (1979)). *See also, Federated Dep't Stores, Inc. v. Moitie*, 452, U.S. 394, 398, 101 S. Ct. 2424, 2438, 69 L. Ed.2d 103 (1981).

In *Brown*, this Court addressed the question of whether res judicata barred a bankruptcy court from considering evidence extrinsic to a state court judgment and the record in a prior

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[7] Mrs. Gurley is not asserting a secured claim or a priority claim in her husband's estate. Rather, Mrs. Gurley is simply seeking recognition of her independent ownership interests as a claim, to be paid in the same priority as her husband's other creditors.

state suit when determining whether a debt previously reduced to judgment is dischargeable. *Id.* at 127-28. After considering the respondent's contention that the doctrine of "res judicata stops harassment and promotes the orderly processes of justice by encouraging the consolidation of the entire dispute between debtor and creditor into one prior proceeding" this Court in *Brown* however found that the interests of res judicata (encouraging reliance on judicial decisions, barring vexatious litigation and freeing the courts to resolve other disputes) were *not* served by foreclosing petitioner from submitting additional evidence.[8] *Id.* at 132.

Similarly here, Mrs. Gurley asked the Florida Bankruptcy Court to consider evidence of the value or her interest in property which had been included in her husband's bankruptcy estate. This evidence consisted of (i) a judicial determination from the Tennessee Bankruptcy Court holding that she did, in fact, possess an interest in the property; (ii) actuarial testimony concerning each spouse's relative interest in the property; and (iii) appraisal testimony for certain assets.

The *Brown* decision itself arguably countenances the submission of such additional evidence in a claims allowance proceeding, however, this case presents an additional and perhaps more compelling fact not present in *Brown*. Mrs. Gurley's claim under § 502(h) could not arise until after the transfers were set aside and the value of the transfers was returned to the estate. 11 U.S.C. § 502(d). *See In re Republic Trust & Sav. Co.*, 897 Fd.2d 1041, 1045-46 (10th Cir. 1990) *cert. denied by Hackler v. Langenkamp*, 498 U.S. 896, 111 S. Ct. 245, 112 L. Ed.2d 204, and *cert. granted, jmt. rev'd by Langenkamp v. Culp*, 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed.2d 343 (1990)(reversed on other grounds). It is only after

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[8] This Court recognized that "[b]ecause res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. . . . It therefore is to be invoked only after careful inquiry." *Id.* at 132.

an adverse judgment and return of the property to the estate that a claim under § 502(h) can, by definition, arise.[9] *Id.* (stating "appellants cannot possibly become creditors of the estates until after the conclusion of the adversary proceedings [to avoid transfers] against them. Otherwise, a transferee who has a valid defense to a preference action and ultimately no liability to the estate would be permitted to vote on and object to a plan"). *Id.* at 1046 n.4. Forcing transfer recipients to litigate the allowance of claims under § 502(h) concurrently with the transfer avoidance proceedings serves neither the orderly process of justice nor the does it free the courts to resolve other disputes.

Remarkably, the lower courts here not only incorrectly applied res judicata to bar Mrs. Gurley's submission of evidence, they did so in the face of another judicial decision of a court of equal and competent jurisdiction which held that she possessed a recognizable interest in the property. Instead, the lower courts have held that the doctrine of res judicata applies to the decisions of the Florida Bankruptcy Court but not to the decisions of the Tennessee Bankruptcy Court. Even applying the doctrine of res judicata or collateral estoppel to the holding in the Transfer Case, the lower courts erred in that all that was necessary for the Florida Bankruptcy Court to include the property in the Debtor's bankruptcy estate was a finding that the Debtor had any "legal or equitable interest" in the property. By the same token, the Tennessee Bankruptcy Court held in the Turnover Case, that Mrs. Gurley *also* held a "legal or equitable interest" in the same property. 122 B.R. at 145 (emphasis added).

Thus, two courts of equal and concurrent jurisdiction held that each spouse possessed an interest in the same property.

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[9] In fact, if Mrs. Gurley had been successful in her appeal in the Transfer Case, then there would be no claim, as she would not have been required to turnover to her husband's bankruptcy estate any property.

Neither court, however, has ever adjudicated the relative interests of the two spouses in the property in question.[10]

This Court's more recent decision in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed.2d 454 (2003) reaffirms the concept that res judicata is not a bar to inquiry into matters beyond the scope of the judgment or record in another court where the policies of res judicata are not implicated. *Id.* at 321. The lower courts erred in applying the doctrine of res judicata to bar Mrs. Gurley's claim and their decisions are contrary to this Court's decisions in *Archer*, *Brown* and similar cases.

11 U.S.C. § 502(h) Issue.

Beyond the preclusion issues, the lower courts erred in their unsupported reading of 11 U.S.C. § 502(h) and the allowability of claims thereunder. The plain language of section 502(h) of the Bankruptcy Code affords Mrs. Gurley a claim. Section 502(h) provides that a claim arising from recovery of property under §§ 522, 550, or 551 shall be allowed or disallowed the same as if it had arisen prepetition. 11 U.S.C. § 502(h). App. 58a. Section 550 provides the mechanism for recovery of transfers and incorporates, among other sections, § 544 governing fraudulent transfers. 11 U.S.C. § 550. App. 60a-61a.

First, the plain language of § 502(h) holds that a claim arising from recovery of property under § 550 shall be

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[10] It is not legally or intellectually inconsistent for this result to obtain. Again, it was not necessary for the Florida Bankruptcy Court to adjudicate Mrs. Gurley's interests to find that her husband held an interest in the same property. Similarly, the Tennessee Bankruptcy Court did not ignore the Florida Bankruptcy Court's finding that Mr. Gurley held an interest in the property. Rather, it recognized Mr. Gurley's interest as a claim against Mrs. Gurley's chapter 11 estate. What Mrs. Gurley seeks is merely an evidentiary hearing to determine the extent of her interest in the total bundle of assets which were returned to her husband's estate.

allowed or disallowed the same as if it had arisen prepetition. App. 58a. Section 502(h) does not provide, as the lower courts held, that only *certain* claims for recovery of property under § 550 shall be allowed or disallowed. Secondly, the plain language of § 101(10)(B) defines a "creditor" as an entity that has a claim against the estate of kind a specified in § 502(h), among others. 11 U.S.C. § 101(10)(B)[11] App. 59a.

Further, the Eleventh Circuit Court of Appeals' decision below is in conflict with the holding of the First Circuit Court of Appeals' decision in *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991), which held that a recipient of a fraudulent transfer which is avoided by the trustee is in fact entitled to file a proof of claim for sums returned to the bankruptcy estate. *Id.* at 1257. *Max Sugarman* involved an action to avoid fraudulent and preferential transfers of property and to subordinate the recipient's claim. Judge Cyr found that certain transfers were avoidable as fraudulent transfers and then rather routinely stated that the recipient could "file a proof of claim pursuant to §§ 501(d) and 502(h) upon compliance with the payment or turnover order of the bankruptcy court." *Id.*

Concomitantly, the plain language of § 101(10)(B) defines a "creditor" as an entity that has a claim against the estate of kind a specified in § 502(h), among others. 11 U.S.C. § 101(10)(B). App. 59a. "Claim" is defined generally as a right to payment or a right to an equitable remedy. 11 U.S.C. § 101(5)(A) and (B). By operation of § 502(h) and § 550, Mrs. Gurley is a creditor and holds a claim. The language of these sections could not be any clearer. The plain meaning of legislation should be conclusive and Mrs. Gurley is entitled to a claim. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235,

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[11] Certain courts also hold that the dollar limitations on eligibility for relief under chapter 13 take into account potential § 502(h) claims. *See In re Toronto*, 165 B.R. 746 (Bankr. D. Conn. 1994) and *In re Scovis*, 231 B.R. 396 (9th Cir. BAP 1999).

241, 109 S. Ct. 1026, 103 L. Ed.2d 290 (1989). What is left for determination is the amount of her claim about which there are genuine factual disputes. Moreover, Mrs. Gurley's independent ownership interests in property should be recognized as a "claim" and entitled to the protections afforded holders of claims. To hold otherwise, as the lower courts have done, unlawfully strips Mrs. Gurley of her property.

Assuming for argument that § 502(h) is ambiguous, a review of the legislative history indicates a conscious decision by the Congress to include fraudulent transfer recipients in the class of creditors entitled to assert claims under § 502(h). As COLLIER ON BANKRUPTCY observes, the current version of § 502(h) is "immensely broader" than the proposed version of the section which would have limited claims under § 502(h) only to those arising from avoidance under § 547.[12] 3 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, ¶502.08 (15th Ed. 1991). *See also*, § 504(h) of H.R. 8200, Feb. 1978 and S. 2266, July 1978. The current edition of COLLIER states that "[t]he import . . . of § 502(h) is that *regardless of the circumstances by which the trustee or debtor recovers property* under section 522, 550 or 553, the claim which arises from recovery will be allowed . . . with status as a prepetition claim existing at the time of the filing of the debtor's petition." 4 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, ¶502.09[2] (15th Ed. Revised 1999)(emphasis added).

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[12] The legislative history of section 502(h) states as follows:

> Section 502(h) of the House amendment *expands* similar provisions contained in the Senate amendment to indicate that *any* claim arising from recovery of property under section 522(i), 550, or 553 shall be determined as though it were a prepetition claim.

124 CONG. REC. H11089 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6450 (Sept. 28, 1978) and 124 CONG. REC. S17406 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6518 (Oct. 6, 1978) (emphases added).

The Trustee himself recognizes the correctness of this analysis because, he made this identical argument to the Memphis Bankruptcy Court in the Turnover Case. *See* note 2 *supra*. The Trustee argued to the Memphis Bankruptcy Court that "[a]s the recipient of [a] judicially determined fraudulent conveyance, B.J. Gurley [Mrs. Gurley] *is limited to filing a proof of claim in W.M. Gurley's bankruptcy estate*. Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 21 (Feb. 26, 1998)(emphasis added). Further, the Trustee clearly and unmistakably argued to the Memphis Bankruptcy Court that "under section 502(h), B.J. Gurley [Mrs. Gurley], as the recipient of a fraudulent transfer who is forced to surrender the property by virtue of the Orlando Bankruptcy Court's judgment *has the right to file a claim against W.M. Gurley's estate*." *Id.* at 22 (emphasis added). Remarkably, the Trustee even went so far as to point out to the Memphis Bankruptcy Court that "[t]he fact that a fraudulent transferee may file a proof of claim in the transferor's bankruptcy court is found in several authorities." *Id.* at 21.

These positions demonstrate (i) the correctness of Mrs. Gurley's analysis of § 502(h) and (ii) the inescapable fact that the Trustee knew of the existence of Mrs. Gurley's claims and acquiesced in her pursuit of such claims. Moreover, he advocated in the Memphis Bankruptcy Court for the result that he now opposes in the Florida Bankruptcy Court. This evidence is what the Florida Bankruptcy Court refused to consider when it summarily elected to selectively apply res judicata to bar Mrs. Gurley's claim.[13]

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[13] The Trustee argued in the Memphis Bankruptcy Court that Mrs. Gurley's "claim to the fraudulently transferred property is deemed to have arisen before the date W.M. Gurley filed for bankruptcy." Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 22 (Feb. 26, 1998). Incredibly, the Trustee, in his proposed findings of fact submitted to the Florida Bankruptcy Court (which were adopted verbatim by the

If for no other reason, this Court should grant this petition due to the injustice wrought by the lower courts' decisions which is demonstrated by the following non-exclusive list of examples:

Mrs. Gurley and her husband acquired 235.25 acres of real property in Hardeman County, Tennessee on July 12, 1985. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a.[14] The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband also acquired 50 acres of real property in Hardeman County, Tennessee on August 29, 1985. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to

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Florida Bankruptcy Court), asserts that "Mrs. Gurley's claim fails because she did not have a claim against the Debtor before the Petition Date." App. 44a.

[14] This and the other properties listed herein are the properties referred to by the Florida Bankruptcy Court as "numerous tracts of real property located in the 4th and 5th civil District Hardeman County, State of Tennessee" and referenced by plaintiff's exhibits 57-83. App. 10a.

authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

On May 10, 1984, Mrs. Gurley and her husband acquired 80 acres of real property in Hardeman County, Tennessee. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

On May 2, 1978, Mrs. Gurley and her husband acquired 171.25 acres of real property in Hardeman County, Tennessee. The couple owned the property as tenants-by-the entireties for eleven (11) years and which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in

this property, how can it be said that she has no claim for the value of her own interest this property?

On July 2, 1981 Mrs. Gurley and her husband acquired 68.2 acres of real property in Hardeman County, Tennessee. For eight (8) years the couple owned the property as tenants-by-the entireties then later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 30.2 acres of real property in Hardeman County, Tennessee on September 13, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired lots 8 & 9 of the Pinecrest Subdivision in Hardeman County, Tennessee on October 16, 1981 and owned the property for eight (8) years.

App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 5.34 acres of real property in Hardeman County, Tennessee on August 8, 1988. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

For nearly twenty (20) years Mrs. Gurley and her husband owned 42.5 acres of real property in Shelby County, Tennessee as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value

of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 20 acres of real property in Shelby County, Tennessee on January 15, 1988. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 62 acres of real property in Shelby County, Tennessee on October 12, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 5.28 acres of real property in Shelby County, Tennessee on October 12, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 20.29 acres of real property in Shelby County, Tennessee on December 5, 1980. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

The above list includes some of the more prominent examples; however, there are numerous other examples of assets of a similar character.

The Florida Bankruptcy Court found that "[a]ccording to financial records, the Debtor's assets totaled approximately

$15,730,342 and Mrs. Gurley's assets totaled approximately $7,005,700 in December 1988." App. 8a. The Florida Bankruptcy Court went on to find that the "[f]inancial records reflect that the Debtor's assets totaled approximately $1,791,370 and Mrs. Gurley's assets totaled $24,369,568.00 in December 1989" (App. 11a) and that the "[f]inancial records reflect that the Debtor's assets totaled approximately $258,459.00 and Mrs. Gurley's assets totaled approximately $23,305,307 in July 1995 [immediately preceding the Debtor's filing of the chapter 7 case]." App. 13a. The Trustee recovered approximately $23 million, thus it is apparent that the courts below have incorrectly used the doctrine of res judicata to strip the approximate $7 million beginning balance that the Florida Bankruptcy Court acknowledged was owned by Mrs. Gurley. Neither res judicata nor § 502(h) can countenance such a result.

This Court must grant this petition for a writ of certiorari because the United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). This is Mrs. Gurley's last opportunity to have some court review this matter and ensure that the ends of justice are served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 29, 2004

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11602
Non-Argument Calendar

D.C. Docket No. 02-00086-CV-OC-10-GRJ
and 95-03833-BKC-6B

IN RE: WILLIAM M. GURLEY,
Debtor.

CHERYL JANE FOLLOWELL,
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF BETTY JEAN GURLEY,
Plaintiff-Appellant,

versus

GEORGE E. MILLS, JR.
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(December 31, 2003)

Before CARNES, WILSON and COX, *Circuit Judges.*

PER CURIAM:

Cheryl Jean [sic] Followell ("Followell"), as personal representative for the estate of Betty Jean Gurley ("Mrs. Gurley"), appeals the order of the district court affirming the bankruptcy court's order granting summary judgment to George E. Mills, Jr., Trustee ("Trustee") for the bankruptcy estate of William Gurley ("Mr. Gurley"). Followell raises

two issues on appeal, contending that the bankruptcy court and district court: (1) erred by holding that 11 U.S.C. § 502(h) did not authorize Mrs. Gurley's Claim Number 9; and (2) incorrectly applied the doctrine of res judicata and collateral estoppel. We review de novo the grant of summary judgment, *In re Optical Technologies, Inc.*, 246 F.3d 1332, 1335 (11th Cir. 2001), and the conclusions of law, *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001) *cert. denied*, 122 S. Ct. 66 (2001). We address Followell's res judicata and collateral estoppel argument first.

The Florida Bankruptcy Court,[1] in Mr. Gurley's prior Chapter 7 bankruptcy proceedings, determined that some property purportedly transferred from Mr. Gurley to Mrs. Gurley were Mrs. Gurley's assets in title only and that equitable ownership remained with Mr. Gurley. In an unpublished opinion, we affirmed the bankruptcy court's order, concluding that no valid transfer had occurred from Mr. Gurley. (R.3-BR-A9 at 4.) After Mrs. Gurley filed her own Chapter 11 bankruptcy petition, the Tennessee Bankruptcy Court found that the assets in question were part of Mrs. Gurley's estate (because she had legal title to the property), but that the Trustee for Mr. Gurley's estate had an equitable lien on the property. After a hearing, the Tennessee Bankruptcy Court determined the value of the interest of the Trustee for Mr. Gurley's estate and Mrs. Gurley paid the Trustee the full amount of the value set by the Court. Mrs. Gurley then filed Claim Number 9 in the Florida Bankruptcy Court, in which she asks the Florida Bankruptcy Court to revisit the Tennessee Bankruptcy Court's valuation of the Trustee's interest in the assets in question.

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[1] For continuity, we use Followell's terminology to refer to Mr. Gurley's bankruptcy action in the Middle District of Florida and Mrs. Gurley's bankruptcy petition in the Western District of Tennessee.

Rather than attacking the bankruptcy court's analysis of the case under the doctrines of res judicata and collateral estoppel, Followell argues that the Trustee should be estopped from asserting these defenses. Followell contends that Mrs. Gurley expressly preserved the right to pursue this claim in her Plan, even after it was confirmed. Followell further argues that the Trustee, by acquiescing to the confirmation of Mrs. Gurley's Plan, had knowledge that Followell would assert a claim under § 502(h), and cannot now argue that Followells, claim is barred. But, whether the Trustee had notice that Mrs. Gurley (and now Followell) would pursue a claim based on § 502(h) is irrelevant to the defenses that the Trustee is entitled to raise in response; the fact that Mrs. Gurley preserved a right to pursue a claim does not mean that the claim is due to be allowed.

Beyond her estoppel argument, Followell does not articulate how the bankrupty court erred in applying the doctrines of res judicata and collateral estoppel. Allowing Followell to dispute the nature of ownership and value of the property at issue would relitigate issues already finally determined by both bankruptcy courts. Followell cannot now assert that Mrs. Gurley paid consideration or value for transferred property because those issues were previously litigated. Now dissatisfied with the Tennessee Bankruptcy Court's valuation, and failing either to persuade the Tennessee courts or pursue an appeal through the Sixth Circuit Court of Appeals, Followell returns to the Eleventh Circuit to collaterally attack the Tennessee Court's valuation. The doctrines of res judicata and collateral estoppel bar relitigation of these issues.

As to Followell's second argument, we conclude that the bankruptcy court properly interpreted § 502(h). Mrs. Gurley did not have a prepetition claim against her husband.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

[Filed 2003 FEB 27 AM 9:20]

Case No. 5:02-cv-86-OC-10GRJ
Bankruptcy No. 95-03833-BKC-6B7

IN RE: WILLIAM M. GURLEY,
Debtor.

BETTY JEAN GURLEY,
Appellant,

-vs-

GEORGE E. MILLS, JR., Trustee,
Appellee.

ORDER AFFIRMING MEMORANDUM OPINION AND JUDGMENT OF THE BANKRUPTCY COURT

This is a bankruptcy appeal from a Memorandum Opinion and Judgment of the Bankruptcy Court (in its Orlando Division) granting the Trustee's Motion for Summary Judgment sustaining the Trustee's objection to the allowance of certain claims filed by the Appellant, Betty Jean Gurley.

Upon full consideration and de novo review of the record, the Judgment of the Bankruptcy Court made the subject of this appeal is hereby AFFIRMED in all respects on the authority of the well reasoned Memorandum Opinion of the Bankruptcy Court.

The Clerk is directed to enter Judgment accordingly and to forthwith furnish a copy of this Order together with a copy of

such Judgment to the Clerk of the Bankruptcy Court. The Clerk is further directed to terminate all pending motions, if any, and to close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 26th day of February, 2003.

/s/ _____
UNITED STATES DISTRICT JUDGE
(signature illegible) G. Kendall Sharpe

Copies to:
Counsel of Record
Maurya McSheehy

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed AUG 15 1997]

Case No. 95-03833-6B7

IN RE: WILLIAM M. GURLEY,
Debtor.

Adv. Case No. 95-00293

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM M. GURLEY,
Defendant.

Adv. Case No. 96-00159

GEORGE E. MILLS JR., CHAPTER 7 TRUSTEE,
Plaintiff,

v.

BETTY JEAN GURLEY,
Defendant.

MEMORANDUM OPINION

At Orlando, in said District on May 7-9, 12-16, and June 12, 1997, before Arthur B. Briskman, Bankruptcy Judge.

This matter came before the Court on Final Evidentiary Hearing on the Plaintiffs' United States of America, Complaint To Object To Or Revoke A Discharge Pursuant to 11 U.S.C. § 727 (a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5),

(a)(7), and (c) and George E. Mills Jr., Chapter 7 Trustee, Complaint Seeking to Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b). Appearing before the Court were Robert L. Young, counsel for the Debtor, William M. Gurley; Richard M. Gladstein, counsel for the United States of America; James E. Foster, counsel for George E. Mills Jr., Chapter 7 Trustee; and Michael Williamson, counsel for Betty Jean Gurley. After reviewing the pleadings, exhibits, evidence, receiving live testimony from William M. Gurley, Betty Jean Gurley, Robert Harris, Cathy Toller, Jim D. Dorris, Dr. Mitchell Albert, Keith Papke, George E. Mills Jr., David Weeks, Robert Pflueger, Ed Tillman, Bill Kimmel, Bedford Forest Heath, Ray Rotella, Dr. Charles Brandon, and Jim Gentry, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Debtor, William M. Gurley, formed Gurley Refining Company ("GRC Co."), a partnership, with his wife and son to refine used oils. The Debtor and Betty Jean Gurley ("Mrs. Gurley") formed Gurley Refining Corporation ("GRC Corp.") in 1963 which accepted waste oil from GRC Co. and reprocessed it into usable oils. GRC Co. and GRC Corp. dumped spent sulfuric acid and clay residue from a refining process into a pit one eighth of a mile upgradient in Edmonson, Arkansas ("Edmonson site") in Spring 1979. The Environmental Protection Agency ("EPA") conducted site inspections beginning in 1982 and detected the hazardous substances. The EPA determined that the Debtor, along with others, was responsible for the disposal of hazardous wastes at the Edmonson site. The Debtor refused to clean the Edmonson site in accordance with the EPA plan of reme-

diation pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et. seq.*

The EPA brought a civil action, concerning the Edmonson site, in the United States District Court, Eastern District of Arkansas ("District Court") against the Debtor and others, including Mrs. Gurley, Larry Gurley, GRC Co., and GRC Corp. on November 18, 1987 to recover costs incurred and to be incurred in the clean-up. The EPA dismissed Mrs. Gurley as a defendant in June 1990.

The United States of American ("United States"), as part of pre-trial discovery, filed interrogatories, requests for production, motions to compel and conducted a deposition with the Debtor, seeking information regarding the Debtor's and his companies' liability and financial ability. The Debtor refused to provide the United States with personal financial information.

According to financial records, the Debtor's assets totaled approximately $15,730,342.00 and Mrs. Gurley's assets totaled approximately $7,005,700.00 in December 1988.

GRC Co. was sold to Coastal Unilube, Inc. ("Coastal") for $13,900,000.00, plus $2,300,00.00 in the form of a consulting agreement and a covenant not to compete in 1988. A portion of the sum was to be paid in installments. $4,600,000.00 was deposited in the Debtor's and Mrs. Gurley's joint account at Union Planters Bank ("Union") and later into Mrs. Gurley's account at Union in 1990. The Debtor maintains access to and control over these funds.

Bedford Forest Health ("Mr. Heath") is a trusted employee of the Debtor's who has worked for him for many years. Mr. Heath assisted the Debtor in effecting monetary and property transfers to Mrs. Gurley. Mr. Heath acts at the Debtor's direction and continues to aid him in access and control of the assets transferred. The Debtor instructed Mr. Heath to

deposit future installment payments, through 1993, totalling $1,280,000.00, into Mrs. Gurley's account at Union. The Debtor has an equitable interest in these monies transferred to Mrs. Gurley.

The Debtor purported to transfer Moltan Co. to Mrs. Gurley by deed of gift on February 2, 1989. The Debtor formed Moltan Co. ("Moltan") in the 1980's doing business as a sole-proprietorship in Tennessee and Nevada to continue a business previously known as Maltan, Inc. Moltan manufactures diatomaceous earth, an oil absorbent material used in cat litter and other products. The Debtor drew up and signed a deed of gift on February 2, 1989. It was given to Mr. Heath, and at the direction of the Debtor was placed in a filing cabinet located at Moltan. The Debtor did not tell Mrs. Gurley as the new owner. The Nevada and Tennessee employment and revenue agencies were not notified of Mrs. Gurley's status as "owner" of Moltan until April 1990. The Internal Revenue Service ("IRS") was initially notified in March 1991.

The gift of Moltan was not validly effected. The gift of deed was never delivered to Mrs. Gurley. The gift of Moltan never came within the power and control of Mrs. Gurley. Also, there was no true donative intent by the Debtor to divest himself of all dominion and control over Moltan. The Debtor continues to control Moltan and intended to from the time of execution of the alleged gift. The gift of deed has no effect. Moltan is the property of the Debtor's, and is therefore, property of the estate.

Even if the deed of gift was effective, the Debtor has an equitable interest in Moltan, causing it to be property of the estate. The Debtor continues to own and run Moltan. All agents and employees of Moltan receive instruction from and look to the Debtor as boss. The Debtor takes no compensation from Moltan. Minutes taken from Moltan management meetings notice his presence and absence. The

minutes do not reflect Mrs. Gurley's absence or presence. He continued for years to represent to the Governors of Nevada and others that he was the owner of Moltan. He is continuously involved in the manufacturing, pricing, and shipping of products and the acquisition of assets at Moltan. The Debtor is the only authorized signatory on the Moltan Mastercard which he has used for both business and personal expenses between January 1990 and November 1995. Mrs. Gurley has no input in the management and control of Moltan. She signs Moltan checks, but has no knowledge as to the purpose or direction of such funds. The Debtor is the true owner of Moltan and all of its assets, real and personal.

The Debtor transferred $2,999,143.00 in commercial paper in a Tax Free Trust account at Union to Mrs. Gurley's account at Union in 1989. The Debtor effected this transfer through the aid of Mr. Heath. The Debtor has access to these funds through Mr. Heath, and therefore, maintains an equitable interest in these funds. The Debtor transferred $1,550,00.00 from the Debtor's and Mrs. Gurley's joint account at First Tennessee Bank ("First Tennessee") to an individual account of Mrs. Gurley's in 1989. The Debtor transferred $7,500.00 from Memphis stockyard payments to Mrs. Gurley between December 1989 and January 1990. The Debtor transferred his interest in numerous tracts of real property located in the 4th and 5th Civil District of Hardeman County, State of Tennessee to Mrs. Gurley on July 7, 1989 and August 9, 1989, respectively. (See P.Ex. #57-83).

Deposits of approximately $2,000,000.00 were made into the Debtor's and Mrs. Gurley's joint account at SunTrust Bank ("SunTrust") between July 1989 and April 1992. Funds from this account were used to purchase a condominium in Mrs. Gurley's name in located in Lake County, Florida in 1989. Deposits of approximately $2,200,000.00 were made into the Debtor's and Mrs. Gurley's joint account at Union

Planters National Bank ("Union"), in addition to the funds from the sale of GRC Co. to Coastal. The Debtor withdrew $389,235.00 from their joint account at Union and deposited the funds into Mrs. Gurley's account at Union. These funds originated from a joint federal income tax refund payable to the Debtor and Mrs. Gurley.

Financial records reflect that the Debtor's assets totaled approximately $1,791,370.00 and Mrs. Gurley's assets totaled approximately $24,369,568.00 in December 1989.

The United State's attorney, Craig Johnson ("Mr. Johnson"), at the conclusion of the Edmonson site trial, on September 13, 1990, raised concerns regarding the sale and rumored transfers from the Debtor to his wife, Mrs. Gurley. The District Court instructed Mr. Johnson to file a Motion and Affidavit in support of the allegations that there were conveyances of property which needed to be set aside. The District Court refused to permit Mr. Johnson to conduct discovery on the issue at that time. Mr. Johnson did not file a Motion or Affidavit, stating that he had no direct evidence or knowledge of the fact that the Debtor had transferred the proceeds from the sale to Coastal to Mrs. Gurley.

The Debtor transferred $63,626.00, proceeds of the Mulvaney Promissory Note, to Mrs. Gurley on September 19, 1990. The Debtor transferred proceeds of the sale of property located at lot 1, Gurley Subdivision, Desoto County, State of Mississippi to Mrs. Gurley on December 6, 1990. (See P.Ex. #319-320).

The District Court entered judgment in favor of the United States of America on March 26, 1992, holding the Debtor, GRC Corp., GRC Co., and Larry Gurley jointly and severally liable for clean-up costs in the amount of $1,786,502.95. The District Court also entered a declaratory judgment in favor of

the EPA for future costs to be incurred at the Edmonson site. *U.S. v. Gurley Refining Co.*, 788 F. Supp. 1473 (E.D. Ark. 1992).[1]

The Debtor transferred to Mrs. Gurley $59,714.00 of annuity payments he received from Great West Life Annuity and Insurance Company and interest payments on certificates of deposit from 1991 to 1994. The Debtor transferred Nevada real property located at Mount Diablo Meridian, Nevada, Township 23 N., Range 27 E, section 32, lots 8, 11, and 12 to Mrs. Gurley in December 1992. (See P.Ex. #47-52).

The United States, through the Financial Litigation Unit of the United States Attorney's Office of the Eastern District of Arkansas, sent demand letters to the Debtor and continued attempts to discover personal financial information from the Debtor, concerning the Edmonson site. These attempts were unsuccessful. The United States did not (1) take depositions in aid of execution, (2) obtain an issuance of a writ of execution, (3) review public property records, (4) review corporate records, (5) issue subpoenas for banks and other record keepers. The United States failed to exercise reasonable due diligence in discovering the transfers to Mrs. Gurley. The Debtor refuses to pay the judgment, today totaling approximately twelve million dollars ($12,000,000.00).

The EPA discovered waste residues in West Memphis, Arkansas ("South 8th Street site") and held GRC Co., GRC Corp. and the Debtor responsible. The EPA initiated an action pursuant to § 1104(e) of CERCLA against the Debtor in September 1993, seeking to require the Debtor to provide

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[1] The Eight Circuit Court of Appeals affirmed the judgment of the District Court on December 28, 1994. *U.S. v Gurley*, 43 F.3d 1188 (8th Cir. 1994). The Debtor's petition for writ of certiorari was denied by the United States Supreme Court on October 2, 1995. *William M. Gurley v. U.S.*, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995).

information as to his potential liability for the cost of remediation and his ability to those costs. This action was pursued independent of the Edmonson site case.

The United States, through a Remedial Project Manager, David Weeks ("Mr. Weeks"), investigated and sought to obtain personal financial information from the Debtor in accordance with § 104(e) of CERCLA, 42 U.S.C. § 9604(e). The Debtor evaded service and refused to reveal personal financial information with respect to the South 8th Street site case. At no time did the attorneys and investigators of the Edmonson and South 8th Street sites come into contact to combine investigative efforts or to exchange informational requests and responses. The EPA did not (1) review public records, (2) review corporate records, or (3) issue subpoenas for banks and other record keepers.

Financial records reflect that the Debtor's assets totaled approximately $258,459.00 and Mrs. Gurley's assets totaled approximately $23,305,307.00 in July 1995.

The Debtor filed for relief under Chapter 7 of the Bankruptcy Code on July 26, 1995. 11 U.S.C. § 101. *et. seq.* The United States is listed in the Debtor's Schedule F as an unsecured, non-priority creditor with a claim in an "unknown" amount and "disputed." The United States initiated an adversary proceeding by filing a Complaint To Object To Or Revoke A Discharge Pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5), (a)(7), and (c) on October 24, 1995. The Chapter 7 Trustee, George E. Mills ("Trustee") initiated an adversary proceeding by filing a Complaint Seeking To Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b) on April 25, 1996. The United States filed a proof of claim in this bankruptcy case, asserting that the Debtor owes it approximately twenty-five million dollars ($25,000,000.00) in past and future clean-up costs at the Edmonson and South 8th Street sites.

The Debtor in his bankruptcy petition, Statement of Financial Affairs and schedules filed with the Court falsely listed that he had no assets with the exception of $800.00 of exempt property in his bankruptcy petition. He did not accurately reflect his liabilities and did not disclose the existence of the Edmonson site judgment. The Debtor signed all provisions, swearing under penalty of perjury, that he read the information contained in his petition, Statements of Financial Affairs and schedules. He failed to disclose the following information: (1) he had a certificates of deposit titled in his name which he transferred post-petition to Mrs. Gurley on November 3, 1995; (2) he received approximately $60,000.00 from Greatwest Life and Annuity Insurance Co. between 1992 and 1994; (3) he is a managing executive at Moltan; (4) he received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; (5) he was an officer/director in five corporations within the two years before he filed his petition; and (6) he used Jim Dorris as an accountant. The Debtor filed subsequent amendments to disclose that he had received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; he was an officer/director in five corporations within the two years before he filed his petition; and that he used Jim Dorris as an accountant.

The Debtor is a highly sophisticated businessperson. He met with his attorney in July 1995 to discuss his filing of a petition in bankruptcy. He was represented by competent counsel. He wanted to file immediately, time was of the essence. The Debtor provided his attorney with the information to complete the Chapter 7 petition, statement of Financial Affairs and all other sworn Statements in support of his petition. He reviewed all sworn Statements with his attorney before they were filed with the Court. He did not question his attorney. He did not exercise due care in completing, reviewing and executing the documents.

The Debtor filed a petition in bankruptcy in order to obtain the protection of the Court. His omissions and carelessness demonstrate a blatant disregard for the objectives and provisions of the Bankruptcy Code. The Debtor attempted to take advantage of a system created to benefit him. The Debtor's actions and attitude reflected disrespect and disregard for the law. The Debtor's failure to disclose his past and present interests in property, cash and business was intentional, knowing, fraudulent and material when omitted from his sworn Statements filed with the Court. The Debtor made false oaths in connection with this case.

The Debtor testified at the § 341 meeting of the creditors in February 1989 that he had previously transferred all of his assets, including Moltan Company ("Moltan"), real estate, cash and securities to Mrs. Gurley by 1989. The Debtor's reasons for the transfer include estate planning and health concerns. The Debtor began to transfer his assets at a time when the United States' multimillion dollar suit against him in the Edmonson site case seemed to be succeeding and when it appeared that the case against Mrs. Gurley was going to be dismissed. The Debtor made all transfers to an insider. He retained complete control of all property transferred after the transfers occurred. The Debtor transferred substantially all of his assets. He received no consideration. He became insolvent as a direct result of the transfers. The Debtor transferred his assets with the actual intent to hinder, delay and defraud the United States.

Mrs. Gurley pays for all of the Debtor's living expenses. She has no knowledge of the numerous accounts, investments and interests in her name. Mrs. Gurley signs documents and checks when requested to without knowledge of the purpose and direction of such funds. The Debtor has use of credit cards in her name. Mr. Heath facilitated numerous transfers to Mrs. Gurley, at the Debtor's direction. The Debtor has access to the transferred assets through Mr. Heath. All banking documents and instructions with respect to them

refer to "per Forest", Mr. Heath. Through Mr. Heath, the Debtor continues to manage and control all accounts, investments and interests of Mrs. Gurley. The dominion and control he exerts makes him the true owner of all assets transferred to Mrs. Gurley. Additionally, a close family relationship exists between the Debtor and the titleholder of all of the disputed property, Mrs. Gurley. The Debtor held himself out to the public in general that he was the "owner" of Moltan. He is a significant force in its corporate decision making. Moltan lacked any involvement by Mrs. Gurley; she never interfered with the Debtor's use and control. The Debtor exercises complete control and total domination over all assets transferred to his wife.

The Debtor is the effective owner of all property transferred to his wife. The Debtor at all time exercises a de facto ownership as he exercises plenary control for his own benefit over all property and funds transferred. The Debtor received no consideration for any of the assets transferred. The Debtor became insolvent as a direct result of the transfers to Mrs. Gurley. All assets transferred to Mrs. Gurley are property of the Debtor; and therefore, property of the estate.

CONCLUSIONS OF LAW

I.

The first issue before the Court is whether the Debtor's discharge should be denied pursuant to 11 U.S.C. § 727(a)(4).

Section 727(a(4) provides:

> (a) The Court shall grant the debtor a discharge, unless—
>
> > (4) the debtor knowingly and fraudulently, in or in connection with the case—
> >
> > > (A) made false oath or account; . . .

11 U.S.C. § 727(a)(4). A discharge may be denied where the debtor makes deliberate omissions. A discharge can also be

denied where the debtor's omission is fraudulent and material. The subject matter of a false oath is "material", and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. *Chalik v. Moorefiled* (*In Re Chalik*), 748 F.2d 616 (11th Cir. 1984); *Windmiller v. Evans* (*In re Evans*), 106 B.R. 722 (Bankr. M.D. Fla. 1989). It makes no difference that he does not intend to injure his creditors when he makes a false statement. The creditors are entitled to judge for themselves what will benefit and what will prejudice them. The debtor's veracity is essential to the successful administration of the Bankruptcy Code. *In re Chalik*, 748 F.2d 616 (11th Cir. 1984); *L.P. Govaert v. Southern National Bank of North Carolina* (*In re Caserta*), 182 B.R. 599 (Bankr. S.D. Fla. 1995). Omissions signed under penalty of perjury constitute false oath. *Phillips v. Nipper* (*In re Nipper*), 186 B.R. 284 (Bankr. M.D. Fla. 1995).

The Debtor signed all provisions, swearing under penalty of perjury, that he read the information contained in his petition. Statements of Financial Affairs, and schedules. He falsely listed that he had no assets with the exception of $800.00 of exempt property in his bankruptcy petition. He did not accurately reflect his liabilities and did not disclose the existence of the Edmonson site judgment. He failed to disclose the following information: (1) he had a certificates of deposit titled in his name which he transferred post-petition to Mrs. Gurley on November 3, 1995; (2) he received approximately $60,000.00 from Greatwest Life and Annuity Insurance Co. between 1992 and 1994; (3) he is a managing executive at Moltan; (4) he had received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; (5) he was an officer/director in five corporations within the two years before he filed his petition; and (6) he used Jim Dorris as an accountant. The Debtor filed subsequent amendments to disclose that he had received $700,000.00 in non-compete

income from Coastal Unilube in 1992 and 1993; he was an officer/director in five corporations within the two years before he filed his petition; and he used Jim Dorris as an accountant.

The Debtor is a highly sophisticated businessperson. The Debtor met with his attorney in July 1995 to discuss his filing of a petition in bankruptcy. He was represented by competent counsel. He wanted to file immediately, time was of the essence. The Debtor, alone, was the one who provided his attorney with the information to complete the Chapter 7 petition, Statement of Financial Affairs and all other sworn Statements in support of his petition. He did not exercise due care in executing the documents. He reviewed all sworn Statements with his attorney before they were filed with the Court. If he was uncertain as to any question he could question his attorney; he did not. He understood what inquiry was being made in the petition, Statement of Affairs and schedules. He had the ability to consult his attorney. The facts support the allegation that the Debtor made false oaths in connection with this case.

The facts reveal a pattern of numerous omissions which certainly warrants the inference of reckless and cavalier disregard for the truth. *In re Sausser*, 159 B.R. 352 (Bankr. M.D. Fla. 1993); *In re Evans*, 106 B.R. 722 (Bankr. M.D. Fla. 1989). The Debtor filed a petition in bankruptcy in order to obtain the protection of the Court. His omissions and carelessness display a blatant disregard for the provisions of the Bankruptcy Code. The Debtor attempted to take advantage of a system available to benefit the honest, but unfortunate debtor. The Debtor's actions and attitude reflect disrespect and disregard for the Court. The Debtor offered no plausible explanation at trial for his omissions. *In re Nipper*, 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995). The absent responses would have been material to discovering what, if any, assets the Debtor may have had. *In re Chalik*, 748 F.2d

616 (11th Cir. 1984). The Debtor's failure to disclose his past and presents interest in property, cash and businesses was intentional, knowing, fraudulent and material when omitted from his sworn Statement filed with the Court. The Debtor's discharge is due to be denied pursuant to 11 U.S.C. § 727(a)(4).

II.

The second issue is whether the Debtor's alleged gift of Moltan to Mrs. Gurley was effective under Florida law.[2]

The gift of Moltan was not validly effected. The essential elements of a gift between husband and wife are (1) delivery, actual or constructive; (2) donative intent of the donor to divest himself of all dominion and control; and (3) acceptance by the donee, which may be presumed. *Fuller v. Fuller*, 215 S.2d 507, 510 (Fla. Dist. Ct. App. 1968). Delivery is an essential element of any gift and this requirement is directly applicable to asserted gifts between spouses. *Jones v. Ferguson*, 150 Fla. 313, 7 So.2d 464 (1942); *Winner v. Winner*, 370 So.2d 845 (Fla. Dist. Ct. App. 1979). Delivery of a deed is essential to the passing of title to the property intended to be conveyed to the grantee and is indispensable between members of a family as between persons unrelated. *Janes v. Janes*, 15 Fla. 716, 15 So.2d 677 (Fla. 1943); *United States v. Viomar Co.*, 616 F.Supp. 24 (Fla. Dist. Ct. App. 1985).

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[2] The parties have not disputed the application of Florida law to this case. The same result would be obtained under Tennessee law. An undelivered deed cannot effectively pass title from the grantor to the grantee. *Miller v. Morelock*, 185 Tenn. 466, 473, 206 S.W.2d 427, 430-31 (1948); *State of Tennessee v. Home Indemnity Company*, 442 S.W.2d 276 (Tenn. Ct. App. 1967). Additionally, the deed must be beyond the grantor's control. *Traders National Bank*, 142 Tenn. 229, 234, 217 S.W. 977, 978 (1919); *Estate of Atkinson v. Allied Fence & Improvement Co.*, 746 S.W.2d 709, 711-12 (Tenn. Ct. App. 1987).

The facts fail to establish the existence of either actual or constructive delivery of the property at issue. All transfers by written instrument must pass beyond the dominion and control of the donor and come within the power and control of the donee. 38 Am.Jur.2d. Gifts, s 31. The alleged gift of deed was delivered by the Debtor to his trusted employee, Mr. Heath. The gift of deed was filed and remains filed at Moltan at the Debtor's direction and never came into Mrs. Gurley's possession. There was no evidence that the gift of Moltan came within the power and control of Mrs. Gurley. At the time of the alleged transfer, there was no evidence that there had even been a symbolic change in title or control of Moltan. Mrs. Gurley does not exert control at Moltan nor was she aware of the alleged gift for years after it was executed. Additionally, there was no true donative intent by the Debtor to divest himself of all dominion and control over the gifted property, Moltan. The Debtor continues to control Moltan and intended to from the time of execution of the alleged gift. The gift of deed has no effect, as a result Motlan is property of the Debtor and, is therefore, property of the state pursuant to 11 U.S.C. § 541(a)(1).

III.

The third issue before the Court is whether the Chapter 7 trustee can recover a judgment pursuant to 11 U.S.C. § 544(b) for fraudulent transfers pursuant to Florida Statutes § 726.105 and/or 28 U.S.C. § 3304.

The trustee in bankruptcy "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . ." 11 U.S.C. § 544(b); *In re Davis*, 785 F.2d 926 (11th Cir. 1986). The trustee acting under § 544 represents the unsecured creditor, the United States. The general rule is that § 544(b) confers upon the trustee no greater rights of avoidance than the creditor would have to assert invalidity on

his own behalf. If the creditor is barred from recovery because of the running of a statute of limitations prior to the petition date, the trustee is likewise rendered impotent. *In re Kaufman & Roberts, Inc.*, 188 B.R. 309 (Bankr. S.D.1995).

A transfer is fraudulent under Florida Statutes § 726.105, Florida Fraudulent Transfer Act ("FUFTA"), regarding transfers which are fraudulent as to present and future creditors if:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (A) With actual intent to hinder, delay or defraud any creditor of the debtor; . . .

Fla. Stat. § 726.105 (1997). A cause of action with respect to a fraudulent transfer under § 726.105(1)(a) is extinguished, unless an action is brought within four years after the transfer was made, or if later, within one year after the transfer was or could have been reasonably been discovered by the claimant. Fla. Stat. § 726.110(1) (1997).

The trustee may only bring a claim to recover property transferred on or after April 25, 1992, four years before initiating the adversary proceeding on April 25, 1996. The United States with the exercise of reasonable due diligence could have reasonably discovered that the transfers to Mrs. Gurley occurred. The United States could have discovered the transfers in 1992 at the time the judgment was entered. Its sole reliance on the Debtor's refusal to respond to its requests for financial information was not reasonable. The United States had until March 1993 to bring a claim against the Debtor pursuant to Fla. Stat. § 726.105(1)(a). The trustee may only bring this claim under § 726.105(1)(a) to recover the property transferred on or after April 25, 1992.

The facts leave no doubt that the Debtor made transfers with actual intent to hinder, delay and defraud his creditor,

the United States.[3] The transfers were to Mrs. Gurley, an insider.[4] The Debtor retained complete control of all property transferred after the transfers occurred. A multimillion dollar suit had been filed against the Debtor prior to the time the transfers were made. The transfers made to Mrs. Gurley were of substantially all of the Debtor's assets. The Debtor received no consideration for the value of the assets he transferred to his wife. The Debtor became insolvent as a direct result of the transfers to his wife. The Debtor began to transfer significant assets to his wife before the United States obtained judgment against him and was completely insolvent after the United States obtained the judgment in March 1992.

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[3] (1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transfers the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Fla. Stat. § 726.105(2).

[4] An "insider includes:

1. a relative of the debtor . . .

Fla. Stat. § 726.102(7).

The trustee, standing in the shoes of the United States, may recover the following property fraudulently transferred by the Debtor on or after April 25, 1992 pursuant to Florida Statutes § 726.105(1)(a) and 11 U.S.C. § 544(b):

> (1) Coastal Unilube payments transferred to Mrs. Gurley on or after April 25, 1992.
>
> (2) Annuity payments transferred to Mrs. Gurley on or after April 25, 1992, and
>
> (3) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after April 25, 1992.

The Federal Debt Collection Procedures Act ("FDCPA") provides substantive federal fraudulent conveyance law for the United States. 28 U.S.C. §§ 3301-3308; *United States v. Moore*, 968 F.2d 1099, 1100 (11th Cir. 1992). The FDCPA arose to provide a single process by which the United States could collect debts owing to it, thereby circumventing the fifty district state debt collection procedures under which it had formerly been compelled to proceed. The United States may recover under both the FDCPA and FUFTA. *United States v. Maryans*, 1994 WL 681146 (N.D. Ind. 1994); *United States v. Carney*, 796 F.Supp. 700, 703 (E.D. N.Y. 1992). Section 3304 provides:

> (a) Debt arising before transfer-Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debtor to the United States which arises before the transfer is made or the obligation is incurred if—
>
> (1)(A) the debtor makes the transfer or incurs the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation; and
>
> (B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation; . . .

> (b) Transfers without regard to date of judgment-(1) Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the transfer or incurs the obligation—
>
> (A) with actual intent to hinder, delay, or defraud a creditor; or

28 U.S.C. § 3304.

The United States may, without regard to the date of judgment, bring a claim for relief under § 3304(b)(1)(A) within six years after the transfer was made or if later, within two years after the transfer was or could have been reasonably discovered. 28 U.S.C. § 3306(b). The United States may, when a debt arises before the transfer is made, bring a claim for relief under § 3304(a)(1) within six years after the transfer was made. 28 U.S.C. § 3306(b).

The debt for which the government through the trustee, seeks satisfaction arose in this case in March 1992 upon the entry of judgment against the Debtor. The statute of limitations applicable, without regard to the date of judgment, § 3304(b)(1)(A), provides that this claim for relief is extinguished unless it was brought six years after the transfer was made. This claim is timely only against property fraudulently transferred on or after April 25, 1990, six years before the adversary proceeding was filed in 1996. The United States could have reasonably discovered the transfers in 1992 through reasonable due diligence. The present action under § 3304(b)(1)(A) is timely only as to fraudulent transfers made on or after April 25, 1990.

The Debtor's transfers of property and cash to Mrs. Gurley was made with actual intent to hinder, delay and defraud a

creditor, the United States.[5] The transfers were to Mrs. Gurley, an insider.[6] The Debtor retained complete control of all property transferred after the transfers occurred. A multimillion dollar suit had been filed against the Debtor prior to the time the transfers were made. The transfers made to Mrs. Gurley were of substantially all of the Debtor's assets. The Debtor received no consideration for the value of the assets he transferred to his wife. The Debtor became insolvent as a direct result of the transfers to his wife. The Debtor began to transfer significant assets to his wife before this United States obtained judgment against him and was completely insolvent after the United States obtained the

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[5] Actual intent may be determined by whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transfers the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[6] An "insider includes:

1. a relative of the debtor . . .

Fla. Stat. § 726.102(7).

judgment in March 1992. The trustee may recover the following property fraudulently transferred by the Debtor on or after April 25, 1990 pursuant to 28 U.S.C. § 3304(b)(1)(A) and 11 U.S.C. § 544(b):

(1) Nevada real property transferred to Mrs. Gurley on April 8, 1992,

(2) Coastal Unilube payments transferred to Mrs. Gurley on or after April 25, 1990,

(3) Mulvaney note proceeds transferred to Mrs. Gurley on September 19, 2990,

(4) Annuity payments transferred to Mrs. Gurley on or after April 25, 1990,

(5) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after April 25, 1990, and

(6) Proceeds from the sale of Mississippi property transferred to Mrs. Gurley on December 6, 1990.

The statute of limitations applicable, when a debt arises before the transfer is made, § 3304(a)(1), provides that this claim must be brought by the United States six years after the transfer was made. 28 U.S.C. § 3306(b). The present action is timely filed as to fraudulent transfers made on or after March 26, 1992, when the debt obtained by the United States arose. 28 U.S.C. § 3302(3); *United States v. Gelb*, 783 F.Supp. 748, 755 (E.D. N.Y. 1991); *United States v. Lombardi*, 924 F.Supp. 361, 363 (D. R.I. 1996). The Debtor received less than reasonable equivalent value for the transfers made because he received no consideration. Further, the Debtor became insolvent as a result of the transfers.

The trustee, standing in the shoes of the United States, may recover the following property fraudulently transferred by the Debtor on or after March 26, 1992 pursuant to 28 U.S.C. § 3304(a)(1) and 11 U.S.C. § 544(b);

(1) Nevada real property transferred to Mrs. Gurley on April 8, 1992,

(2) Coastal Unilube payments transferred to Mrs. Gurley on or after March 26, 1992,

(3) Annuity payments transferred to Mrs. Gurley on or after March 26, 1992, and

(4) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after March 26, 1992.

IV.

The fourth issue before the Court is whether the property transferred by the Debtor is property of the estate pursuant to 11 U.S.C. § 541(a)(1).

Section 541(a)(1) of the Bankruptcy Code provides, with certain exceptions, that all legal and equitable interests of a debtor in property as of the commencement of the case, wherever located or by whomever held, become property of the estate. 11 U.S.C.A. § 541(a)(1) (West 1993). The underlying theory of § 541(a)(1) is to bring into the estate all interests of the debtor in property as of the date the case is commenced. The term "property" must be construed generously. *United States v. Whiting Pools, Inc.*, 462 U.S. 198. 204-05, 103 S.Ct. 2309, 2313-14, 76 L.Ed.2d 515 (1983); *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S.Ct. 511, 514, 15 L.Ed.2d 428 (1966). The estate will include all legal or equitable interests of the debtor in property, both tangible and intangible. 5 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 541.04 (15th ed. 1997). Applicable state property law determines whether a debtor had a legal or equitable interest in property as of the Bankruptcy petition date. *Burner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *In re Health Products, Inc.*, 159 B.R. 332, 337 (M.D. Fla. 1993).

An equitable owner is one who is recognized in equity as the owner of property, because real and beneficial use and title belong to him, even though bare legal title is invested in

another. BLACK'S LAW DICTIONARY 539 (6th ed. 1990); *Levin v. Carney*, 161 Ohio St. 513, 120 N.E.2d 92 (1954). The estate acquires the equitable interest of the debtor who holds an equitable interest in property without legal title.

At the time of the petition, the Debtor had an equitable interest in all of the property, real property, and cash transferred to Mrs. Gurley. Bare legal title is not determinative of all property rights; Florida law recognizes that true ownership or an ownership interest may rest with a party who is not the titleholder of record. *Towerhouse Condominium, Inc. v. Millman*, 475 So.2d 674 (Fla. 1985); *Simpson v. United States v. Woodard*, 1989 WL 732112 (M.D. Fla. 1989). An ultimate equitable owner "means a natural person who, directly or indirectly, owns or controls and ownership interest in a corporation, . . . regardless of whether such natural person owns or controls such ownership interest through one or other natural persons . . . ." Fla. Stat. §§ 607.0505 and 517.161 (1997).

A close family relationship exists between the Debtor and the titleholder of all of the disputed property, Mrs. Gurley. The Debtor exercises control and dominance over all assets transferred to his wife. Through his trusted employee, Mr. Heath, the Debtor has access to all assets transferred. With respect to Moltan, the Debtor repeatedly held himself out to the public in general that he was the "owner". Additionally, he is the dominant force in its corporation decision making, producing and pricing. Moltan lacked any involvement by Mrs. Gurley; she never interfered with the Debtor's use and control. Besides his control over Moltan, he continues to make all accounts, investments and interests of Mrs. Gurley. As a trusted employee of the Debtor's, he abets the Debtor in obtaining access to these assets. The Debtor is the effective owner of all property transferred to his wife and in an effort to secrete his ownership he made his wife his nominee.

Libutti v. United States, 107 F.3d 110 (2nd Cir. 1997). The Debtor at all time exercises a de facto ownership as he exercises plenary control for his own benefit over all property and funds transferred. All property transferred by the Debtor to his wife is property of the estate pursuant to 11 U.S.C. § 541(a)(1).

V. Conclusion

The Debtor's discharge is due to be denied pursuant to 11 U.S.C. § 727(a)(4). The Debtor is a highly sophisticated businessperson who consulted a competent attorney in order to obtain protection in the bankruptcy court. The Debtor carelessly and deliberately omitted signification information from his petition, Statement of Financial Affairs and schedules filed with the Court. In addition, he actions and attitude display a blatant disregard for the law and this Court. The Debtor recklessly and cavalierly disregarded the truth.

The Debtor's purported deed of gift of Moltan to his wife was ineffective. There was no actual or constructive delivery nor did the Debtor have donative intent to divest himself of all the dominion and control of Moltan. Moltan is the property of the estate pursuant to 11 U.S.C. § 541(a)(1).

Additionally, the Trustee may recover property fraudulently transferred by the Debtor with actual intent to hinder, delay, and defraud the United States as described by the Court pursuant to Fla. Stat. § 726.105, 28 U.S.C. § 3304, and 11 U.S.C. § 544(b).

Even if the Debtor's transfer of Moltan was effected by a valid deed of gift and even if the FUFTA and the FDCPA do not apply to the trustee's claim, all property transferred by the Debtor to Mrs. Gurley is property of the estate. The Debtor maintains an equitable interest in all property transferred to Mrs. Gurley, including Moltan, cash and real property, pursuant to 11 U.S.C. § 541(a)(1). With respect to Moltan,

the Debtor held himself out to the public and employees as the owner of Moltan. Mrs. Gurley does not exercise control at Moltan.

Additionally, the Debtor exercises control and dominance over all other assets transferred to Mrs. Gurley. Through his trusted employee, Mr. Heath, he has continuous access to the assets. This enables him to manage all accounts, investments and interests in Mrs. Gurley's name. The Debtor's transfers to his wife, Mrs. Gurley, were ineffective. The Debtor has an equitable interest in all property transferred to Mrs. Gurley. The assets are; therefore, property of the estate pursuant to 11 U.S.C. § 541(a)(1).

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed Dec. 27, 2001]

Case No. 95-03833-6B7

In re: WILLIAM M. GURLEY,

Debtor.

ORDER GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT ON TRUSTEE'S OBJECTION TO ALLOWANCE OF CLAIM NO. 3 FILED BY BETTY JEAN GURLEY AND TRUSTEE'S MOTION FOR SUMMARY JUDGMENT ON TRUSTEE'S OBJECTION TO ALLOWANCE OF CLAIM NO. 9 FILED BY BETTY JEAN GURLEY

MEMORANDUM OPINION

This case came on for hearing on the Trustee's Motion for Summary Judgment on its Objection to Allowance of Claim No. 3 filed by Betty Jean Gurley "Claim No. 3 Motion" and Trustee's Motion for Summary Judgment on Its Objection to Allowance of Claim No. 9 filed by Betty Jean Gurley "Claim No. 9 Motion" (collectively, the "Motions"). (Docs. 200 & 202).[1] Betty Jean Gurley ("Mrs. Gurley") filed responses to

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[1] The Trustee filed objections to each of Mrs. Gurley's four claims. (Docs. 102, 104, 186 & 199). Additionally, on April 13, 1998, the United States filed an objection to various claims in this case, including the claims filed by Mrs. Gurley on April 24, 1996 and October 15, 1997.

the Motions. (Docs. 212 & 213).[2] Mrs. Gurley also filed supplemental responses to the Trustee's motions for summary judgment at the Court's invitation to outline for the Court those issues of disputed fact which Mrs. Gurley asserts would prevent the granting the Trustee's motions for summary judgment. (Docs. 221 & 222). The only sworn evidence submitted by Mrs. Gurley in opposition to the Trustee's motions is her affidavit in support of Claim No. 3.

Appearing were: James E. Foster on behalf of the chapter 7 Trustee, George E. Mills, Jr., and John Dunlap and James E. Bailey on behalf of Betty J. Gurley.

After reviewing the motions for summary judgment, the responses in opposition, arguments of counsel, and authorities for their respective positions, there is no genuine issue as to any material fact and that the undisputed material facts set forth below compel the conclusions of law set forth below which entitle the Trustee to summary judgment on all claims.

(Doc. 84). The United States asserts that Claim No. 3 relates to attorney fees paid by Mrs. Gurley on behalf of Gurley Refining Co., Inc. ("GRC") or the Debtor and that to the extent Claim No. 3 is for debts incurred by GRC such claim should be disallowed because GRC is not a debtor in this bankruptcy case. The United States also objects to Claim No. 4 in its entirety based upon this Court's September 16, 1997 Amended Judgment in *George E. Mills, as Chapter 7 Trustee, v. Betty Jean Gurley*, Adversary Proceeding No. 96-159-6B7. The United States additionally asserts that Mrs. Gurley is not entitled to a claim pursuant to 11 U.S.C. § 502(h).

[2] Mrs. Gurley also filed an answer to the Trustee's objection to Claim No. 9 (Doc. 211). In that answer, Mrs. Gurley contends that the Trustee's assertion that any allowed claim should be subordinated requires addressing the objection in an adversary proceeding. Mrs. Gurley did not renew this contention in her response to the Motions. In her answer, Mrs. Gurley also states that the Trustee's objection to Claim No. 9 should be dismissed for the Trustee's failure to comply with the rules governing bankruptcy adversary proceedings. Because the Court sustains the Trustee's objection to Claim No. 9 on other grounds, it is not necessary to reach this issue to enter a final order.

I. FINDING OF FACTS.

A. Mills v. Gurley.

William M. Gurley (the "Debtor") filed a voluntary petition for Chapter 7 bankruptcy relief on July 26, 1995 (the "Petition Date"), and George E. Mills, Jr., was appointed Chapter 7 Trustee (the "Trustee"). The Trustee initiated an adversary proceeding against Betty Jean Gurley, the Debtor's wife, to recover property of the estate. *See George E. Mills, as Chapter 7 Trustee v. Betty Jean Gurley*, Adversary Proceeding No. 96-159-6B7 (the "Adversary Proceeding").[3]

A Memorandum Opinion (the "Memorandum Opinion") in favor of the Trustee and against Mrs. Gurley was entered on August 15, 1997. (Adv. Pro. 95-293-6B7 Docs. 109 & 109A).

An Amended Judgment was entered pursuant to Mrs. Gurley's request for reconsideration on September 16, 1997. (Adv. Pro. 95-293-6B7 Doc. 122). Mrs. Gurley held $11,070,287 in certain real property and the business known as Moltan, as the nominee of W. M. Gurley. The Trustee was entitled to recover that property and its proceeds from Mrs. Gurley as Mr. Gurley, the Debtor, was the true owner. The United States Supreme Court's April 30, 2001, denial of Mrs. Gurley's Petition for Certiorari rendered the Court's September 16, 1997 Amended Judgment final and subject to no further appeal. The findings of fact and conclusions of law in the Memorandum Opinion and the judgments entered pursuant thereto in the Adversary Proceeding are incorporated into this Order and Memorandum Opinion by reference. Mrs. Gurley asserts claims, discussed infra, deriving from the

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[3] This Adversary Proceeding was consolidated with *United States v. Gurley* (*In re Gurley*), Adversary Proceeding 95-293-6B7.

Memorandum Opinion and the judgments entered pursuant thereto and the enforcement thereof.[4]

B. Mrs. Gurley's Tennessee Bankruptcy.

On October 20, 1997, after the entry of the Amended Judgment, Mrs. Gurley filed her own individual chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Tennessee, Western Division, In re Betty Jean Gurley, Case No. 97-35255-L (hereinafter "Mrs. Gurley's Bankruptcy Case"). Mrs. Gurley's Bankruptcy Case was assigned to United States Bankruptcy Judge Jennie D. Latta. The Tennessee Court undertook an examination of the Memorandum Opinion and Amended Judgment to determine its meaning and effect, after the Trustee unsuccessfully sought dismissal of Mrs. Gurley's Bankruptcy Case as a bad faith filing, or, alternatively, the transfer of venue to this Court. *See In re Gurley*, 222 B.R. 124 (Bankr. W.D. Tenn. 1998).

The Tennessee Court held that the effect of the Amended Judgment was to "recognize an equitable interest in the disputed assets in favor of the Trustee, most closely resembling a constructive trust." *Id.* at 135. The Tennessee Court determined the Trustee's "equitable lien" attached to some but not all of the property asserted to be property of Mrs. Gurley's estate[5] and the balance of the Trustee's claim [$11,070,287]

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[4] United States District Judge Sharp affirmed that judgment in an Order dated August 9, 1999, Order (hereinafter the "District Court Order") upon which this Court relies herein.

[5] The Tennessee Court found that the Trustee's equitable lien attached to the assets used in Moltan (paragraph 2 of this Court's Amended Judgment); the survivorship interest of W.M. Gurley in certain Tennessee real property (paragraph 6 of the Amended Judgment); a condominium in Lake County, Florida (paragraph 7 of the Amended Judgment); and certain real property located in Nevada (paragraph 11 of the Amended Judgment). *See* 222 B.R. at 140. Judge Latta also identified the specific

would be treated as unsecured. *Id.* at 145. The Tennessee Court determined the value of the assets used by Moltan and the other real property subject to the equitable lien. (Doc. 222 - Ex. 3 & 4 - the memorandum opinion and order issued by the Tennessee Court determining the value of these assets).

C. Mrs. Gurley's Claims.

Mrs. Gurley filed four proofs of claims. The deadline to file a proof of claim in the Debtor's case was April 24, 1996 (the "Claim Deadline").

1. *Claim No. 3.*

Mrs. Gurley filed an "unsecured" proof of claim for money loaned on July 19, 1995, in the amount of $535,600.00 ("Claim No. 3") on April 24, 1996. The claimed debt was purportedly incurred within one week of the Petition Date. A promissory note dated July 19, 1995 was attached to Claim No. 3, as evidence of the debt. The promissory note was made by Gurley Refining Co. ("GRC"), payable to the order of Mrs. Gurley in the amount of $535,000.00. The promissory note was signed only by GRC. The Debtor, William M. Gurley, signed this promissory note solely in his representative capacity as the president of GRC.

2. *Claim No. 9 and its predecessors, Claim Nos. 4 & 8.*

Mrs. Gurley filed a second proof of claim "under § 502(h) for judgment in favor of Trustee for recovery of alleged fraudulent conveyances" in the unsecured amount of $11,070,280.00 ("Claim No. 4") on October 15, 1997. Mrs. Gurley noted on Claim No. 4 that she "files this proof of claim to preserve her claim against the Chapter 7 estate

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property of Moltan subject to the Trustee's equitable lien. *See id.* at 139-40.

pending the outcome of the appeal, said claim to include the value of Moltan Company in addition to the $11,070,280.00."[6] The Amended Judgment was affirmed and is now final.

The Trustee filed an objection to Claim No. 4 (Doc. 102) on August 24, 1998, stating that this claim was filed after the bar date, that Mrs. Gurley was not legally entitled to assert a claim pursuant to the Bankruptcy Code, including § 502(h), and that Mrs. Gurley is collaterally estopped from asserting the claim because of this Court's findings in the Memorandum Opinion.

Mrs. Gurley filed a third proof of claim "under § 502(h) for judgment in favor of Trustee for recovery of alleged fraudulent conveyances" in the unsecured amount of $10,995,548.79 ("Claim No. 8") on October 23, 1998. Mrs. Gurley noted on Claim No. 8 that she "files this proof of claim to preserve her claim against the Chapter 7 estate, pursuant to the Claimant's Third Amended Plan of Reorganization, confirmed 9/21/98, an additional $11,070,289 plus interest is to be paid to this estate and the Claimant reserves her right to amend and supplement this claim at such time as payment is made."[7]

The Trustee filed an objection to Claim No. 8 (Doc. 188) on September 10, 1999, again asserting that the claim was filed after the bar date, that the claim should be disallowed because it was not supported by any documentation, that Mrs. Gurley was not legally entitled to assert a claim under the Bankruptcy Code, and that Mrs. Gurley was collaterally estopped from asserting a claim based upon this Court's

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[6] The dollar amount appears to be a clerical error as the exact amount of the monetary award as contained in paragraphs 1, 3, 4, 5, 8, 9, 10, and 13 of the Amended Judgment totals $11,070,287.

[7] Again, the dollar amount appears to be a clerical error, as the amount in the Amended Judgment is $11,070,287. *See* footnote 7, *supra*.

findings in the Memorandum Opinion. The Trustee filed an amended objection to Claim No. 4 (Doc. 187) asserting that Claim No. 4 was a duplicate of Claim No. 8, or alternatively, if a new claim, such claim should be disallowed on the same bases as Claim No. 8.

Mrs. Gurley filed a fourth proof of claim on October 19, 1999, "based upon 11 U.S.C. § 502(h)" in the unsecured amount of $23,913,308.66 claiming this debt was incurred by the September 16, 1997 Amended Judgment ("Claim No. 9"). Mrs. Gurley seeks to amend Claim No. 4 and Claim No. 8, through Claim No. 9, in the amount of $23,913,308.66. Mrs. Gurley attached no writing as required by FED. R. BANKR. P. 3001(c) to Claim No. 4, Claim No. 8 or Claim No. 9. The Trustee filed an objection to Claim No. 9 raising the same grounds as his previous objection to Claim No. 8 on July 3, 2001.

II. CONCLUSIONS OF LAW.

A. Standard for Summary Judgment.

The Eleventh Circuit recently discussed summary judgment in the bankruptcy context in *In re Optical Tech., Inc.*, 246 F.3d 1332 (11th Cir. 2001), and stated:

> Under Fed. R. Civ. P. 56(c), made applicable to adversary proceedings and contested matters in bankruptcy cases by Bank. R. 7056 and 9014, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Div. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). " 'In making this determination, the court must view all evidence and

> make all reasonable inferences in favor of the party opposing summary judgment.'" *Chapman v. Al. Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986).
>
> It is axiomatic that a bankruptcy court deciding a summary judgment motion, just like a district court, must determine whether there are any genuine issues of material fact. *See Carey Lumber Co. v. Bell*, 615 F.2d 370, 378 (11th Cir. 1980) (per curiam) (holding that a bankruptcy court that (1) determined that there were no issues of material fact, (2) accepted all undisputed factual allegations as true, and (3) found that summary judgment was warranted as a matter of law, "followed the correct legal standard."). Like a district court, a bankruptcy court may only grant summary judgment where there is no genuine issue of material fact. *See* Fed. R. Civ. P. 56(c).

246 F.3d at 1334. The burden is on the movant, in this case the Trustee, to show that he is entitled to summary judgment. *See In re Britt*, 200 B.R. 409 (Bankr. M.D. Fla. 1996).

B. Burden of Proof.

Fed. R. Bankr. P. Rule 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." The objecting party has the burden of going forward and introducing sufficient evidence to rebut the presumption of validity created pursuant to Rule 3001(f). "Such evidence must be sufficient to evidence a true dispute and must have probative force equal to the contents of the

claim. Upon introduction of sufficient evidence by the objecting party, the burden of proof must then be met by the claimant by a preponderance of the evidence." 8 *Collier* on Bankruptcy, ¶ 3001.05 (15th ed. 1995). "The burden of proof is on the objecting party to produce evidence 'equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim. . . The burden of ultimate persuasion rests with the claimant." *In re Homelands of DeLeon Springs, Inc.*, 190 B.R. 666, 668 (Bankr. M.D. Fla. 1995) citing In re VTN, Inc., 69 B.R. 1005 (Bankr. S.D. Fla. 1987).

A claim is not entitled to be considered as prima facie evidentiary proof when such a claim is based upon a writing and the claimant fails to attach the original or a duplicate writing, or ,if the writing is lost or destroyed, the claimant fails to supply an explanation of the loss or destruction. See Fed. R. Bankr. P. Rule 3001(c). *See also Bank of Bellwood v. Stoecker (In re Stoecker),* 143 B.R. 879, 883 (N.D. Ill. 1992); *In re Lindell Drop Force Co.*, 111 B.R. 137, 142-43 (Bankr. W.D. Mich. 1990); *In re All-American Auxiliary Assoc.*, 95 B.R. 540, 545 (Bankr. S.D. Ohio 1989).

The asserted claim must be satisfactorily established where the claimant is closely related to the debtor. *See In re Hicks & Son, Inc.*, 10 F. Supp. 684, 686 (S.D.N.Y. 1935). *See also In re McClelland*, 275 F. 576 (S.D. Cal. 1920) (disallowing claim of relative of debtor upon finding no objection upon which claim could be made);[8] *In re All-American Auxiliary Ass'n.*, 95 B.R. 540, 544-45 (Bankr. S.D. Ohio 1989)

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[8] In *McClelland*, the Court found insufficient evidence to establish the existence of loans to a debtor from his sister. The Court stated that "[T]o allow a claim in bankruptcy upon such evidence would constitute a dangerous precedent, and would open the door to conspiracy and fraud and enable dishonest people to rest their claims simply upon their own bare assertions and statements under oath." *In re McClelland*, 275 F. at 578.

(holding that where claimant is an insider his dealings with the debtor are subject to strict scrutiny).[9] "The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed." *Ohio Valley Bank Co. v. Mack*, 163 F. 155, 156-57 (6th Cir. 1906).

C. Mrs. Gurley's Claims.

Under 11 U.S.C. § 101(5) a "claim" is defined as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5) 2001. Congress intended by the Section 101(5) language to adopt a broad definition of "claim." *See Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). The terminology "right to payment" within the definition of "claim" means nothing more nor less than an enforceable obligation. 501 U.S. at 83.

1. *Claim No. 3.*

The Trustee objected to Claim No. 3 because the promissory note attached to the claim in support thereof, on

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[9] In *All-American Auxiliary Assoc.* the insider's proof of claim failed to attach supporting documentation for the majority of the claim. The Court found the claim to be "unsupported by reliable, probative documentation or testimony." *In re All-American Auxiliary Assoc.*, 95 B.R. at 547. The Court also noted that the insider's claim was not based upon any valid promise of remuneration. *See id. at 546.*

its face, is the obligation of GRC, and not the Debtor. (Doc. 102). There is no genuine dispute on this issue. The claim, as filed, does not represent an obligation enforceable against the Debtor's estate.

Mrs. Gurley filed a response to Trustee's Motion for Summary Judgment on August 10, 2001 (Doc. 213)[10], and a Statement of Disputed Issues of Fact Requiring Resolution as to Claim No. 3 (the "Supplemental Response") (Doc. 221) on September 10, 2001; in which she attempted to identify disputed facts relevant to the determination of Claim No. 3.

Mrs. Gurley acknowledges the promissory note attached to the claim is that of GRC, and not that of the Debtor, but she attempts to create a factual issue by asserting that "the note was given to Mrs. Gurley to evidence Mr. Gurley's obligations to her for attorneys' fees paid and costs incurred which Mrs. Gurley paid on his behalf." (Doc. 213 at p. 2).

She attaches her own sworn affidavit in which she states, "I expended funds on behalf of Mr. Gurley prior to the filing of his bankruptcy case for legal fees and other expenses which total *at least the amount* of Claim No. 3." No documents are attached to the claim that would establish such expenditures. Mrs. Gurley states that she would anticipate offering proof in the form of canceled checks and invoices to substantiate the claim and asks for a "a brief period of time" in which to collect the documentation and to amend the claim.

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[10] Mrs. Gurley contends that the Trustee's Motion for Summary Judgment as to Claim No. 3 was premature because the twenty-day time period, applicable under Fed. R. Bankr. P. 7056 and 9014, had not expired at the time the Trustee filed the Motion. Noting that the Trustee's Objection to Claim No. 3 was filed on August 24, 19998, and the Trustee's Motion as to Claim No. 3 was filed on July 5, 2001. Mrs. Gurley agreed to proceed at the hearing on the Trustee's motion.

Mrs. Gurley contends that Mr. Gurley gave the GRC promissory note to evidence *his* obligation. Mr. Gurley is a sophisticated and experienced businessman. He was well aware that he would have to give his own promise to pay, not a third party's, had he intended to evidence his own obligation. His delivery of the GRC note does not "evidence" his personal obligation.

Mr. Gurley purported to divest himself of all assets and caused Mrs. Gurley to pay all his bills and expenses. Mrs. Gurley's affidavit does not identify a specific amount owed; specific bills, individuals or law firms paid; specific costs incurred; or the source of the funds from which the alleged, indefinite payments were made. Mrs. Gurley's naked statement that she, as the nominal holder of Mr. Gurley's assets and as his spouse of more than fifty years, expended sums on his behalf is not sufficient to state a claim against the Debtor's estate.

Mrs. Gurley's affidavit attempts to raise issues of fact that would support a claim entirely different from the claim she purported to assert in Claim No. 3. The claim bar date was April 24, 1996, and any new claim is untimely. Mrs. Gurley may not graft the claim she now wants to prosecute onto the original, defective claim by eleventh-hour amendment. The Trustee filed his objection pointing out the defect in Claim No. 3 more than three years ago. Mrs. Gurley had ample time to file an amendment and did not prior to responding to the Trustee's Motion for Summary Judgment.

Mrs. Gurley has failed to identify any genuine issue of material fact as to Claim No. 3 and that summary judgment in favor of the Trustee as to that claim is appropriate.

2. *Claim No. 9 and its Predecessors.*

Mrs. Gurley grounds Claim No. 9 and its predecessors, Claim No. 4 and Claim No. 8, on §502(h) of the Bankruptcy Code. She raises issues unrelated to a §502(h) claim,

asserting that she has a specific interest in real and personal property included in the Debtor's estate which must be valued and for which she must be compensated. Neither basis asserted will support her claim in her supplemental response to the Trustee's Motion for Summary Judgment.

(a) *Section 502(h) Does Not Authorize Claim No. 9 or its Predecessors.*

Section 502(h) claims usually arise where a creditor is required to repay or return a payment received during the preference period preceding the debtor's bankruptcy. The obligation for which the payment was made is revived and may be asserted against the debtor's estate because the creditor has lost the value of the payment received. Section 502(h) of the Bankruptcy Code provides that:

> 'When a trustee recovers property under 11 U.S.C. § 550, the [party from whom recovery is made] is authorized under § 502(h) to pursue a claim against the bankruptcy estate the same as if such claim had arisen before the date of the filing of the petition.' *See Southmark Corp. v. Schulte, Roth & Zabel, L.L.P.* (In re Southmark Corp.), 242 B.R. 330, 341 (N.D. Tex. 1999). To pursue such a claim against the debtor, however, the [party from whom recovery is made] must be a creditor of the debtor or be able to assert a claim against the debtor under principles of common law.

Official Committee of Unsecured Creditors v. Liberty Savings *Bank, FSB, (In re Toy King Distrib's, Inc.),* 256 B.R. 1, 204 (Bankr. M.D. Fla. 2000).

In *Southmark Corp. v. Schulte, Roth & Zable, L.L.P.*, 242 B.R. 330 (N.D. Tex. 1999), aff'd in part, rev'd in part, 239 F.3d 365 (5th Cir. 2000), the court found that a transferee of a preferential transfer is entitled to assert a claim under § 502(h) as if such claim arose before the date of filing. The

court went on to note that if the transferee fails to present evidence to establish it was a creditor entitled to recover on a claim against the debtor prior to the bankruptcy, or cannot establish third party beneficiary or subrogation rights, it cannot successfully assert a Rule 502(h) claim post-bankruptcy. *See, Southmark*, 242 B.R. at 342.

Courts continue to recognize that § 502(h) addresses the problem of creditors who need to reassert their satisfied pre-petition claims, rather than providing for a new claim created by the mere avoidance of a pre-petition transfer. *See County of Sacramento v. Hackney (In re Hackney)*, 93 B.R. 213, 218 (Bankr. N.D. Cal. 1988) (holding that § 502(h) reinstated non-dischargeable pre-petition claim rather than creating a new, dischargeable claim); *Nakagawa v. Sergio, Inc.* (In re Sergio, Inc.), 16 B.R. 898, 910 (Bankr. D. Haw. 1981) (holding that recipient of fraudulently transferred house, who had not contributed any of her own funds to its purchase and who had participated in the fraudulent conveyance, had no claim against bankruptcy estate after transfer to her was avoided); *Lawrence v. Lawrence (In re Lawrence)*, 237 B.R. 61, 79 (Bankr. D.N.J. 1999) (noting basis for "claim" of ex-spouse in context of § 502(h)).

Mrs. Gurley's claim fails because she did not have a claim against the Debtor before the Petition Date. The mere reversal of a pre-petition transfer does not automatically cause a claim to "arise" in favor of the disappointed transferee. Congress enacted § 502(h) and its predecessor[11] to protect creditors

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[11] Section 57n provided, in relevant part, that "a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the

whose pre-petition claims were paid by pre-petition transfers that were later avoided or recovered by the Trustee or Debtor in Possession. The transferee whose payment was avoided or recovered post-petition, without § 502(h), would, at least arguably, be unable to file a claim against the estate. The legislative notes to § 57n make this clear:

> We have also added a provision which broadly is declaratory of existing law, namely, that a creditor from whom a transfer is recovered or against whom a lien is avoided in favor of the estate may file his *reinstated* claim within thirty days from the date of such recovery or avoidance.

Analysis of H.R. 12889, 74th Cong. 2d Sess. (1936) 180 (emphasis added).

This analysis is supported by the absence of evidence a pre-petition obligation existed between the Debtor and Mrs. Gurley that would give rise to Claim No. 9 to allow Mrs. Gurley to assert the rights of a creditor. *See* 11 U.S.C. §§ 101(5), 502(h). Mrs. Gurley has not established the property recovered by the Trustee had been put in her name or delivered to her possession to satisfy an obligation she could have asserted against the Debtor, her husband, pre-bankruptcy or against his estate post-bankruptcy, as required by *Southmark* and *Toy King*. *See, Southmark Corp.*, 242 B.R. at 342; Toy King, 256 B.R. at 204.

b) *Claim No. 9 Does Not Arise From a Valid, Pre-Petition Right to Payment.*

Mrs. Gurley seeks to recover, through Claim No. 9, and its predecessors, the *entire* value of Moltan and other assets as determined by the Tennessee Court in its Order dated August 31, 1998 (hereinafter the "Valuation Order") (Doc. 222 - Ex.

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trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow."

4),[12] as well as all amounts [$11,070,287] consisting of cash and securities as described in the Amended Judgment that were turned over or paid to the Debtor's estate and has been determined to be the property of the Debtor, W. M. Gurley, and thus the property of the Debtor's estate, in the Adversary Proceeding.

The Amended Judgment and Memorandum Opinion, affirmed by the United States District Court and the Eleventh Circuit Court of Appeals, was that Mrs. Gurley held the assets recovered by the Trustee as the nominee of her husband, the Debtor. The Debtor, and not Mrs. Gurley, retained ownership of the assets and the attempted transfers of the assets used by Moltan and the other assets were never validly effected, and were always property of the Debtor's estate pursuant to 11 U.S.C. § 541(a)(1).[13] The Memorandum Opinion and District Court Order determined at the time of the Debtor's bankruptcy filing, the Debtor was the effective owner of all the other property (cash, bonds and other securities) supposedly "transferred" to his wife.[14] The Trustee did not recover any of Mrs. Gurley's property; the Trustee recovered property rightfully owned by the estate.

c.) *Mrs. Gurley's interest in the Property Subject to Claim No. 9 Has Been Finally Resolved and is Res Judicata.*

"A final judgment on the merits bars further claims by parties or their privies based on the same cause of action," under the doctrine of res judicata, *Montana v. United States*, 440 U.S. 147, 153 (1979). Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously

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[12] In the Valuation Order, and the corresponding Memorandum Opinion, the Tennessee Court determined that the value of the Moltan assets subject to the Trustee's equitable lien was $10,376,000.00.

[13] *See* Memorandum Opinion at p. 15; Order at pp. 5 & 8.

[14] *See* Memorandum Opinion at p. 25; Order at p. 6.

available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940). Res judicata encourages reliance on judicial decisions, bars vexatious litigation and frees courts to resolve other disputes. *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

"[W]hile res judicata bars the relitigation of claims, collateral estoppel precludes the relitigation of an issue that has already been litigated and resolved in a prior proceeding." *Fleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998).

Mrs. Gurley states that a genuine issue of material fact exists as to the value of her interest in the property subject to the claim, in her "Statement of Disputed Issues of Fact Requiring Resolution as to Claim No. 9" (hereinafter the "Supplemental Submission") (Doc. 222).

Mrs. Gurley continues to claim an interest in certain assets used by Moltan despite prior rulings, which are now final. Mrs. Gurley asserts the continued existence of these interests and demands that they be valued and returned to her or that she receive compensation therefor. This issue is foreclosed in these proceedings by the force of the prior ruling. Mrs. Gurley's new claim is a new and alternative theory as to why she has a continuing interest in the assets used by Moltan previously. To address the issues Mrs. Gurley now raises to avoid summary judgment as to Claim No. 9 would be to relitigate not only all of the valuation issues litigated in the Tennessee Court, but the issues initially litigated before this Court. The claim is barred by the doctrine of res judicata.

Mrs. Gurley's claim as to the remainder of the assets that the Tennessee Court determined to be subject to the Trustee's equitable lien also fails. Mrs. Gurley now contends that her interest in the Lake County Condominium must be valued because she purchased that Condominium with her own

funds. That issue should have been included in her appeal of the Amended Judgment. It was not. The principles of res judicata bar relitigation of issues concerning Mrs. Gurley's rights to the property of the Debtor's estate under the guise of valuing an interest through her Claim No. 9.

Mrs. Gurley asserts issues of disputed facts must be resolved as to other assets this Court previously determined the Debtor owned. Her claims are rejected on the grounds of res judicata and collateral estoppel, for the same reasons as referenced in connection with the Lake County Condominium.

Mrs. Gurley recognized and honored the Trustee's unsecured claim, totaling $11,070,287.00 in the consensual confirmed plain in her Tennessee Bankruptcy case. She recognized and honored the Trustee's equitable lien on the Moltan assets and the other assets as valued by the Tennessee Court and paid the same to the Debtor's estate upon confirmation. Mrs. Gurley is now barred by the doctrine of res judicata from seeking to undo what was agreed to in the consensual confirmed plan of reorganization.

The documents Mrs. Gurley attached to her Supplemental Response do not serve to establish the claim she seeks to assert. Those documents were evidence in the adversary proceeding and were weighed and evaluated in determining the findings of fact and conclusions of law embodied in the Memorandum Opinion. None of the documents serves to raise a factual issue not heretofore conclusively decided against Mrs. Gurley's claims.

Mrs. Gurley's post-petition claim allegedly made pursuant to § 502(h) fails because she has no pre-petition claim to reinstate. Mrs. Gurley had no pre-petition claim against the Debtor that led the Debtor to attempt these transfers.[15] Mrs.

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[15] The Debtor testified that "estate planning and health concerns"—rather than a pre-existing obligation to his wife—led him to attempt to

Gurley cannot now assert a claim under § 592(h) for the value of the property the Debtor attempted to transfer. The doctrine of res judicata bars the re-litigation of these issues. The summary judgment in favor of the Trustee as to Claim No. 9 and its predecessors is due to be granted.

III. CONCLUSION.

Based on the foregoing, the Court finds that the Trustee's objections should be sustained, and the claims of Mrs. Gurley disallowed in their entirety.

Accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's Motions for Summary Judgment on Its Objections to Allowance of Claim Nos. 3 and 9 filed by Betty Jean Gurley (Document Nos. 200 and 202) are GRANTED.

2. The Trustee's Objection to Allowance of Claim No. 3 in the amount of $535,600.00 filed by Betty Jean Gurley is SUSTAINED.

3. The Trustee's Objection to Allowance of Claim No. 9 filed by Betty Jean Gurley in the amount of $23,913,308.66 on October 19, 1999, which amends Claim No. 8 in the amount of $10,995,548.79 filed on October 23, 1998, and Claim No. 4 in the amount of $11,070,280.00 filed on October 15, 1997, is SUSTAINED.

4. Claims Nos. 3, 4, 8, and 9 are DISALLOWED in their entirety.

DONE AND ORDERED in Orlando, Florida this 27th day of December, 2001.

---

transfer the various assets to his wife. *See* Memorandum Opinion at p. 11. As an alternative basis for it's ruling, the Court found that the Debtor attempted the transfers to defraud his creditors. *See id.*

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

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I CERTIFY THAT THIS NOTICE WAS SERVED BY U.S. MAIL TO PARTIES AS LISTED ON DEC 27 2001.(Date)

By Deputy Clerk /s/ ————————
(signature illegible)

APPENDIX E

11 U.S.C. §§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2594; Pub.L. 98-353, Title III, §§§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub.L. 101-508, Title III, §§ 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 102-486, Title XXX, §§ 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub.L. 103-394, Title II, §§ 208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129.)

11 U.S.C. § 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or

disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the

holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2579; Pub. L. 98-353, title III, Sec. 445, July 10, 1984, 98 Stat. 373; Pub. L. 99-554, title II, Sec. 257(j), 283(f), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub. L. 103-394, title II, Sec. 213(a), title III, Sec. 304(h)(1), Oct. 22, 1994, 108 Stat. 4125, 4134.)

11 U.S.C. § 101. Definitions.

In this title—

* * * *

(10) "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2549; Pub.L. 97-222, §§ 1, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, §§§§ 391, 401, 421, July 10, 1984, 98 Stat. 364, 366, 367; Pub.L. 99-554, Title II, §§§§ 201, 251, 283(a), Oct. 27, 1986, 100 Stat. 3097, 3104, 3116; Pub.L. 100-506, §§ 1(a), Oct. 18, 1988, 102 Stat. 2538; Pub.L. 100-597, §§ 1, Nov. 3, 1988, 102 Stat. 3028; Pub.L. 101-311, Title I, §§ 101, Title II, §§ 201, June 25, 1990, 104 Stat. 267, 268; Pub.L. 101-647, Title XXV, §§ 2522(e), Nov. 29, 1990, 104 Stat. 4867; Pub.L. 102-486, Title XXX, §§ 3017(a), Oct. 24, 1992, 106 Stat. 3130; Pub.L. 103-394, Title I, §§ 106, Title II, §§§§ 208(a),

215, 217(a), 218(a), Title III, §§ 304(a), Title V, §§ 501(a), (b)(1), (d)(1), Oct. 22, 1994, 108 Stat. 4111, 4124, 4126-4128, 4132, 4141-4143; Pub.L. 106-554, §§ 1(a)(5) [Title I, §§ 112(c)(3), (4)], Dec. 21, 2000, 114 Stat. 2763, 2763A-393.)

§ 550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601; Pub.L. 98-353, Title III, §§ 465, July 10, 1984, 98 Stat. 379; Pub.L. 103-394, Title II, §§ 202, Oct. 22, 1994, 108 Stat. 4121.)

(2)

No. 03-1384

Supreme Court
FILED
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In The

Supreme Court of the United States

CHERYL JANE FOLLOWELL,
as Personal Representative of the
Estate of Betty Jean Gurley,

Petitioner,

v.

GEORGE E. MILLS, JR.,
Chapter 7 Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly ruled that the doctrines of res judicata and collateral estoppel barred Petitioner from relitigating issues of ownership and value of property already finally determined by both the Florida and the Tennessee bankruptcy courts.

2. Whether the Eleventh Circuit correctly affirmed the Florida bankruptcy court's ruling that 11 U.S.C. § 502(h) did not give rise to a claim against Debtor's estate because Mrs. Gurley did not hold any pre-petition claim against her husband, Debtor herein.

PARTIES TO THE PROCEEDING

There are no parties other than the ones named in the caption.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, George E. Mills, Jr., Chapter 7 Trustee of the Estate of William M. Gurley, requests that the Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeal for the Eleventh Circuit in *In re William M. Gurley, Debtor*, Case Number 03-11602, on December 31, 2003.

INTRODUCTION

Petitioner, the personal representative of the probate estate of Betty Jean Gurley, seeks a third review of the decision of the United States Bankruptcy Court for the Middle District of Florida granting the Trustee's Motion for Summary Judgment on his objection to the claim Mrs. Gurley asserted to assets belonging to the bankruptcy estate of her husband, William M. Gurley (*"Gurley III"*).[1] In the statement of the case and of the facts, Petitioner omits or obscures express findings of fact and specific rulings of law made by two bankruptcy courts that considered and resolved the very issues Mrs. Gurley attempted to relitigate through the disallowed claim. Bankruptcy courts in both Florida and Tennessee expended considerable time and effort to untangle the web of confusion and deceit spun by William Gurley in his continuing attempts to protect his assets from his creditors.

[1] *In re William M. Gurley, Debtor*, Case No. 95-03833 (Order of Dec. 27, 2001) (Bankr. M.D. Fla. 2001), *aff'd*, Case No. 6:02-cv-00192 (M.D. Fla. Feb. 28, 2003), *aff'd*, Case No. 03-11602 (11th Cir. Dec. 31, 2003).

In *In re William M. Gurley*, the Florida Bankruptcy Court determined that Mr. Gurley had never divested himself of the assets he purported to transfer to Mrs. Gurley; she held those assets as Mr. Gurley's nominee. The Florida Bankruptcy Court's Amended Final Judgment authorized George E. Mills, Jr., Mr. Gurley's Chapter 7 Trustee (the "Trustee"), to recover those assets for Mr. Gurley's estate. Nonetheless, the Tennessee Bankruptcy Court, in Mrs. Gurley's subsequent Chapter 11 proceeding, ruled that the disputed assets were property of Mrs. Gurley's estate. The Tennessee Bankruptcy Court construed the Florida Bankruptcy Court's judgment as creating an equitable interest in the disputed assets to the extent that Mr. Gurley had retained an interest in those assets. Mr. Gurley's Chapter 7 Trustee, Respondent herein, asserted that interest as a claim against Mrs. Gurley's bankruptcy estate. In evaluating that claim, the Tennessee Bankruptcy Court valued Mr. Gurley's retained interest (the Trustee's equitable interest) in those assets. Mrs. Gurley paid the value of that interest to Mr. Gurley's Chapter 7 estate as part of her confirmed consensual plan of reorganization. Mrs. Gurley's claims in Mr. Gurley's bankruptcy were a collateral attack on the rulings of the Tennessee Bankruptcy Court and the Florida Bankruptcy Court and another attempt to reclaim property finally determined to properly belong in Mr. Gurley's estate.

The United States District Court for the Middle District of Florida, sitting in its appellate capacity, carefully reviewed the record before the Bankruptcy Court in the context of the rulings in the two earlier bankruptcy proceedings and upheld what it described as the Florida Bankruptcy Court's well reasoned decision to grant summary judgment. The Eleventh Circuit affirmed

the decision of the United States District Court. The issues raised in this petition are not novel nor are they of importance to anyone other than the parties to this proceeding. The opinion of the Eleventh Circuit does not conflict with the decisions of this Court or of any other United States Circuit Court of Appeal. There is no reason to grant certiorari review of this action; there is compelling reason to deny review and to allow the bankruptcy court to complete its administration of Mr. Gurley's bankruptcy estate.

STATEMENT OF THE CASE

Petitioner's summary of the decision and judgment of the United States Bankruptcy Court for the Middle District of Florida (the "Florida Bankruptcy Court") in the adversary action the Trustee brought against Mrs. Gurley[2] (*Gurley I*) misstates important facts the court expressly found and distorts the holding itself. The Florida Bankruptcy Court found that Mr. Gurley, the Debtor, had placed certain assets in his wife's name in an attempt to remove them from his bankruptcy estate. The Florida Bankruptcy Court ruled that because Mr. Gurley had not relinquished control and dominion over the assets, and because his wife exercised no dominion and control over them, Mrs. Gurley was a nominee and Mr. Gurley's equitable interest in those

[2] *Mills v. Betty Jean Gurley (In re William M. Gurley)*, Bankruptcy No. 95-03833, Adversary No. 95-293A (Bankr. M.D. Fla. Sept. 16, 1997), *aff'd*, Case No. 6:98-cv-D-1169 (M.D. Fla. Aug. 9, 1999), *aff'd*, Case No. 99-13416 (11th Cir. Sept. 20, 2000), *cert. denied*, 532 U.S. 1009, 121 S. Ct. 1736, 149 L. Ed. 2d 660 (2001).

ostensibly transferred assets remained a part of his estate. App. 27a-28a. This analysis applied specifically to certain accounts, payment streams and specific property identified in the Memorandum Opinion that appears as Petitioner's Appendix C. The Florida Bankruptcy Court applied a different analysis to the business known as Moltan. Moltan was a sole proprietorship of the Debtor, William M. Gurley. The Florida Bankruptcy Court found that no transfer of that business had ever been made to Mrs. Gurley. App. 19a-20a.

Petitioner states that the Florida Bankruptcy Court "included all property held by Mrs. Gurley – including the $7 to $8 million in her own assets and her own survivorship interest in the real property – in her husband's bankruptcy estate." Petition at 3. The Amended Judgment the Florida Bankruptcy Court entered in Adversary Action No. 95-293A demonstrates that Petitioner's statement is not accurate. In fact, the Florida Bankruptcy Court specifically listed those items which were recoverable property – each of which had been the property of William Gurley prior to the purported or attempted transfer. [R. 5 at 28]

Even if Petitioner were accurate in representing that Mrs. Gurley's separate property and her survivorship interest in the Debtor's property was included in the Debtor's estate, that representation would serve only to show that the issue she seeks to assert in this litigation was properly before the Florida Bankruptcy Court and subject to direct appeal. In fact, Mrs. Gurley appealed the Florida Bankruptcy Court's ruling to the United States District Court for the Middle District of Florida, which upheld the Florida Bankruptcy Court's ruling on all

points. *Gurley v. Mills (In re William M. Gurley)*, Case No. 98-cv-D-1169 (M.D. Fla. 1999).

Mrs. Gurley next appealed to the Eleventh Circuit, which also affirmed the ruling of the Florida Bankruptcy Court. *Gurley v. Mills (In re William M. Gurley)*, Case No. 99-13416 (11th Cir. Sept. 20, 2000). This Court declined to grant certiorari. *Gurley v. Mills*, 532 U.S. 1009, 121 S. Ct. 1736, 149 L. Ed. 2d 660 (2001).

Gurley I was Mrs. Gurley's first litigation of her interest in assets that are part of the Debtor's estate.

While her appeal to the United States District Court for the Middle District of Florida was pending, Mrs. Gurley herself sought bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Tennessee (the "Tennessee Bankruptcy Court"). She immediately filed an adversary action against George E. Mills, Jr., as Trustee, to recover the same assets the Florida Bankruptcy Court had directed the Trustee to marshal into Mr. Gurley's estate. *See Gurley v. Mills (In re Betty Jean Gurley)*, 222 B.R. 124 (Bankr. W.D. Tenn. 1998) ("*Gurley II*"). In this action, Mrs. Gurley expressly and unequivocally asserted her claim to **every** asset in Mr. Gurley's estate in which she claimed an interest. The Tennessee Bankruptcy Court agreed with Mrs. Gurley that the assets themselves were part of her estate in *Gurley I*. 222 B.R. at 138. Thus, **every asset listed in the Florida Bankruptcy Court's Order of September 16, 1997, was included in Mrs. Gurley's bankruptcy estate**.

The Tennessee Bankruptcy Court interpreted the Florida Bankruptcy Court's decision as establishing that

Mr. Gurley had an equitable interest in certain assets of Mrs. Gurley's estate.[3] As a result, the Tennessee Bankruptcy Court valued Mr. Gurley's interest in those assets. Petitioner is correct that only Mr. Gurley's interest was valued. All of Mrs. Gurley's interests, regardless of whether a value was assigned, remained in her estate. App. 34a-35a.

Mrs. Gurley did not appeal the Tennessee Bankruptcy Court's valuation of Mr. Gurley's equitable interest. Rather, she prepared a plan of reorganization that accepted the court's valuation of Mr. Gurley's interest and voluntarily satisfied that interest with a cash payment. Any residual interest in the assets, including Mrs. Gurley's survivorship interest, remained part of her estate. That plan was confirmed; the valuation of Mr. Gurley's interest and, by extension, Mrs. Gurley's retention of all remaining interest, became final for all purposes.

Gurley II was Mrs. Gurley's second litigation of the value of her interest in the assets which the Florida Bankruptcy Court ruled were part of Mr. Gurley's estate.

Petitioner, as personal representative, now seeks review of *Gurley III* – Mrs. Gurley's third attempt to reclaim that which has been finally and irrevocably determined to belong to her widower's estate.

Mrs. Gurley asserted several claims in her husband's estate. Claim number 3, a claim on a note, was disallowed,

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[3] Respondent specifically challenges Petitioner's representation that Mrs. Gurley was deprived of all of her property by the actions of the Florida and the Tennessee Bankruptcy Courts.

and Mrs. Gurley did not appeal that determination. Claim number 4 and claim number 8 were, respectively, claims to recover the secured and the unsecured portion of Mr. Gurley's claims in Mrs. Gurley's estate – claims Mrs. Gurley had voluntarily satisfied in full as part of her plan of reorganization. Claim number 4 and claim number 8 were consolidated in claim number 9. App. 35a-37a.

In her plan of reorganization, Mrs. Gurley reserved the right to assert a claim in Mr. Gurley's estate. At the time her plan was proposed and confirmed, Mrs. Gurley was in the midst of appeals of the Florida Bankruptcy Court's ruling. Had the appellate courts reversed all or part of the Florida Bankruptcy Court's decision, Mrs. Gurley would clearly have had a meritorious claim in the Debtor's estate. However, Mrs. Gurleys' appeals were unsuccessful at every level. The Florida Bankruptcy Court's decision was upheld in the face of Mrs. Gurley's tenacious attacks. The present claim does not represent the petitioner's efforts to obtain the return of assets (or value) that was rightfully Mrs. Gurley's at the time it was paid into Mr. Gurley's estate. Rather, it constitutes a collateral attack on the final and effective decisions of *Gurley I* and *Gurley II*.

The facts set forth by Respondent are consistent with and derived from the decisions of the courts in the earlier, separate litigation. Based on these undisputable facts, there is no basis for certiorari jurisdiction in this Court.

REASONS FOR DENYING THE WRIT

The decision of the United States Bankruptcy Court for the Middle District of Florida as affirmed by the

United States District Court for the Middle District of Florida and by the Eleventh Circuit, is consistent with the letter and the spirit of the controlling decisions of this Court and those of other circuit courts of appeals. The lower courts' construction of 11 U.S.C. § 502(h) is consistent with the plain meaning of the statute and with its application by other courts. There is no novel issue of law inherent in this case. Rather, the petition here before the Court represents what is hopefully the last in a series of attempts to avoid the effect of *Gurley I*.

A. PETITIONER'S CLAIM IS BARRED BY THE DOCTRINE OF RES JUDICATA.

Petitioner asserts that certiorari should lie because the decisions of the lower courts are inconsistent with this Court's rulings in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed. 2d 454 (2003); *Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); and *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). Petitioner is wrong. The lower courts' decisions are entirely consistent with the cited cases and with all other controlling authority on the doctrine of res judicata.

Archer v. Warner addresses facts that are not analytically analogous to the convoluted litigation in *Gurley I*, *Gurley II* and *Gurley III*. In *Archer*, the issue before the court was whether a settlement agreement created a novation of the original dispute, and, if so, whether the novation was insulated from the alleged fraud. Substantially the same issue had been presented in the *Brown* case; there, the settlement had resulted in a consent judgment rather than a settlement agreement. In both

cases, the Court ruled that the settlement (whether memorialized by contract or by stipulated judgment) did not prevent the bankruptcy court from considering the allegations of underlying fraud to determine whether the obligation created by the settlement was dischargeable.

That issue is not present in this case. In both *Archer* and *Brown*, trial of the issue of fraud had been forestalled by the settlement. The issue had not been litigated or resolved by the court; fraud was not established. Here, the issue of the value of Mr. Gurley's interest in the assets has been litigated explicitly in *Gurley II* and implicitly in *Gurley I*. Mrs. Gurley's interest – the assets remaining in her bankruptcy estate – has also been fully litigated.

Petitioner's reliance on *Archer* and *Brown* appears to argue that Mrs. Gurley's payment of the value of Mr. Gurley's interest in the assets of Mrs. Gurley's estate was a "settlement" analogous to those which did not constitute res judicata in the cited cases. This argument misses the critical point of *Gurley II* – the valuation of Mr. Gurley's interest was completely litigated and the subject of express findings of fact entered by the Tennessee Bankruptcy Court. [R. 5; *In re Betty Jean Gurley*, Case No. 97-35255 (Order of August 31, 1998) (Bankr. W.D. Tenn. 1998)] Petitioner asserts here (as she did before the Eleventh Circuit) that the Tennessee Bankruptcy Court ignored her interest by valuing Mr. Gurley's estate's equitable interest at the full value of the disputed assets. That valuation is entirely consistent with the Florida Bankruptcy Court's determination that Mr. Gurley had retained ownership and control over all the assets, and it is not inconsistent with the Tennessee Bankruptcy Court's holding that Mrs. Gurley held, at best, a nominal interest in the assets. If the Tennessee Bankruptcy Court erred

(and it did not), Mrs. Gurley bore the responsibility of addressing that error with the Tennessee Bankruptcy Court or with the appropriate appellate courts. That is, she should have and could have raised the issue of the value of her interest in the assets at the time the Tennessee Bankruptcy Court was considering the value of the Trustee's interest in the assets. *See D-1 Enterprises v. Commercial State Bank*, 864 F.2d 36, 38 (5th Cir. 1989).

Not only did Mrs. Gurley **not** object to or appeal from that valuation, she incorporated that valuation into her confirmed consensual plan. She is bound by the confirmation of the plan, as is the Trustee. 11 U.S.C. § 1141(a); *Matter of Howe*, 913 F.2d 1139, 1143-47 (5th Cir. 1990) (Holding that confirmed consensual plan allowing creditor's claims barred debtor's subsequent action against creditor); *In re Harloff*, 247 B.R. 523, 527 (Bankr. M.D. Fla. 2000).

The Eleventh Circuit's ruling on this point is correct and does not contradict or vary this Court's decisions in *Archer* or *Brown*:

> Allowing Followell to dispute the nature of ownership and value of the property at issue would relitigate issues already finally determined by both [the Florida and the Tennessee] bankruptcy courts. Followell cannot now assert that Mrs. Gurley paid consideration or value for transferred property because those issues were previously litigated. Now, dissatisfied with the Tennessee Bankruptcy Court's valuation, and failing either to persuade the Tennessee court or pursue an appeal through the Sixth Circuit Court of Appeals, Followell returns to the Eleventh Circuit to collaterally attach the Tennessee Court's valuation. The doctrines of res judicata

> and collateral estoppel bar relitigation of these issues.

App. 3a. In *Archer* and *Brown*, the issue of fraud had never been litigated. Here, the issue of valuation has been fully litigated. There is no conflict between the decision of the Eleventh Circuit in this case and the decisions of this Court; the issue presented is not novel nor of importance beyond the scope of this litigation. There is no reason for this Court to grant certiorari on this issue.

B. THE FLORIDA BANKRUPTCY COURT, THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA AND THE ELEVENTH CIRCUIT CORRECTLY APPLIED 11 U.S.C. § 502(h).

Petitioner asks the Court to grant certiorari to review the lower courts' interpretation of 11 U.S.C. § 502(h). Again, the interpretation of that statute is consistent with the plain language of the statute and its application by other courts. Petitioner's basis for asserting a claim under section 502(h) is not consistent with the meaning or purpose of the statute.

Petitioner's argument on this issue arises from a misapprehension of the effect of the Tennessee Bankruptcy Court's valuation of Mr. Gurley's interest in the assets in Mrs. Gurley's estate. This misunderstanding is manifest in footnote 10 of the Petition for Writ of Certiorari. Petitioner characterizes the relief sought thus: "What Mrs. Gurley seeks is merely an evidentiary hearing to determine the extent of her interest in the total bundle of assets which were returned to her husband's estate." Petition at 11 n.10. In fact, no bundle of assets **was** returned to Mr.

Gurley's estate. Mrs. Gurley compensated Mr. Gurley's estate for the value of his interest in the assets **she retained** as determined by the Tennessee Bankruptcy Court. *See* 222 B.R. at 146-47.

Section 502(h) of Title 11 of the United States Code provides:

> A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

Section 502(h) claims generally arise when the claimant was required to surrender a payment the debtor made to satisfy a **valid** obligation. If the payment was made during the preference period, the claimant is required to disgorge the payment, but the underlying valid obligation is reawakened and may be asserted as a claim against the bankruptcy estate. The logic behind the statute is clear: The creditor who received and returned a preferential payment is left no worse off than he would have been had the preferential payment never been made.

This settled rule of law simply has no application to the facts underlying Appellant's claim. In the Trustee's adversary action against Mrs. Gurley in *Gurley I*, Mrs. Gurley had the obligation (and every reason and opportunity) to assert her pre-transfer interest in the purportedly transferred assets and any consideration she had given for those assets. She did not meet her burden of proof. The Florida Bankruptcy Court's ruling conclusively establishes that Mrs. Gurley had no interest in and gave no consideration

for the assets she held as Mr. Gurley's nominee, which, contrary to Petitioner's statement to this Court, were by no means **all** of Mrs. Gurley's assets. The Florida Bankruptcy Court and the Eleventh Circuit both recognized that Mrs. Gurley never had any true ownership interest in those assets at all – they were never really hers.

The Tennessee Bankruptcy Court, however, recognized and enforced Mrs. Gurley's legal title to the assets. It valued Mr. Gurley's equitable interests in those specific assets named in the Florida Bankruptcy Court's Amended Final Judgment. Thus, when Mrs. Gurley agreed in her plan of reorganization to pay the value of Mr. Gurley's interest in assets Mrs. Gurley's estate retained, she was not giving up anything of value to which she had a legal right. Rather, she purchased her husband's equitable interest in assets to which she held only naked legal title.

Petitioner asserts conflict with the decision of the First District Court of Appeals in *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991).[4] In that case, a creditor/investor had engaged in fraudulent transfers to surreptitiously obtain payment on the loans it had made to the debtor. The subterfuge was discovered by the bankruptcy court, and the investor/creditor was required to divest itself of the fraudulently transferred payments. Nonetheless, the underlying loan to the debtor had preexisted the filing of the bankruptcy. Thus, when the fraudulent and improper payments

[4] Significantly, Petitioner did not cite *Max Sugarman* as persuasive authority in its briefs to the Eleventh Circuit. Mrs. Gurley did cite the case in briefing to the United States District Court for the Middle District of Florida.

were turned over to the bankruptcy estate, the pre-existing and valid loans were resurrected as a valid claim in the bankruptcy estate.

It is the pre-existing, valid obligation of the debtor to the creditor that distinguishes *Max Sugarman* from Mrs. Gurley's denied claim. Mrs. Gurley's estate retained her entire interest in the assets. She did not **return** assets to Mr. Gurley's estate. Rather, her estate paid his estate the value of **his** interest in certain property of her estate. The Tennessee Bankruptcy Court determined both the validity and the value of Mr. Gurley's claim. Petitioner may not use 11 U.S.C. § 502(h) to recapture payments she voluntarily made to satisfy an interest in property of her estate.

In disallowing Mrs. Gurley's claim, the Florida Bankruptcy Court did not create a novel interpretation of section 502(h). Rather, citing to *Southmark Corp. v. Schulte, Roth & Zable, L.L.P.*, 242 B.R. 330 (N.D. Tex. 1999), *aff'd in part, rev'd in part*, 239 F.3d 365 (5th Cir. 2000); *Official Committee of Unsecured Creditors v. Liberty Savings Bank, FSB (In re Toy King Distributors, Inc.)*, 256 B.R. 1, 204 (Bankr. M.D. Fla. 2000); *County of Sacramento v. Hackney (In re Hackney)*, 93 B.R. 214 (Bankr. N.D. Cal. 1998), and *Nakagawa v. Sergio, Inc. (In re Sergio, Inc.)*, 16 B.R. 898 (Bankr. D. Haw. 1981), the Florida Bankruptcy Court followed the teachings of prior case law. It adopted the analysis of those cases that holds that "§502(h) addresses the problem of creditors who need to reassert their satisfied pre-petition claims, rather than providing or a new claim created by the mere avoidance of a pre-petition transfer." App. 44a. The rulings of the Florida Bankruptcy Court in *Gurley I* and of the Tennessee Bankruptcy Court in *Gurley II* establish with complete finality that Mrs. Gurley "did not have a claim against the Debtor before the

Petition Date." *Id.* Because Mrs. Gurley lacked a valid pre-petition claim which had been satisfied by Mr. Gurley's fraudulent and avoided transfers, Mrs. Gurley did not have a meritorious claim pursuant to section 502(h).

The decision of the Eleventh Circuit on this issue is not novel; it is not in conflict with the decisions of other circuit courts of appeal; it is not contrary to the plain meaning of the statute or to the policy underlying the statute. There is no reason for the Court to grant certiorari review of this issue.

CONCLUSION

For the foregoing reasons, Respondent George E. Mills, Jr., Chapter 7 Trustee, asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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MAY 13 2004

No. 03-1384

IN THE

Supreme Court of the United States

CHERYL JANE FOLLOWELL,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
BETTY JEAN GURLEY,
Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In his brief in opposition, Respondent remarkably contends that the lower courts' decisions on res judicata are consistent with this Court's decisions in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 144 L. Ed. 2d 454 (2003); *Federated Department Stores v. Moitie,* 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981) and *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). Opposition ("Opp.") at 8. In this reply, we show that Respondent's contentions are without merit and that certiorari should be granted because the lower courts' decisions are inconsistent with and cut squarely against the spirit of this Court's decisions on res judicata in bankruptcy cases.

Further, Respondent contends that the lower courts did not err in ignoring the plain language of 11 U.S.C. § 502(h); but, rather that it is Petitioner's use of section 502(h) as a basis for her claim that is inconsistent with Respondent's perception of the meaning and purpose of the statute. Opp. at 11. As demonstrated in the Petition and below, the lower courts' decisions (i) completely ignore the plain meaning of the language of 11 U.S.C. § 502(h); (ii) are inconsistent with the legislative intent, if it is necessary to reach that question in the first instance; and (iii) serve to strip a non-debtor spouse of her interest in property without providing a mechanism for recognizing as a claim the value of her independent interests in property which is included in her spouse's bankruptcy estate.

Finally, Respondent contends that the "Florida Bankruptcy Court's well reasoned decision to grant summary judgment" fails to implicate novel issues or issues of importance to third parties. Opp. at 2-3. It is important to recognize that it was the Respondent, not the Florida Bankruptcy Court, who authored the decision appealed from.[1] As argued below, the

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[1] It is important to recall that the decision of the Florida Bankruptcy Court authored by Respondent is a 180 degree departure from the position he advocated in the Tennessee Bankruptcy Court. There Respondent fully supported and argued for Mrs. Gurley's right to a claim against to the

lower courts were required to review the trial court's decision with heightened scrutiny and to "engage in a more careful analysis" because of its virtual verbatim adoption of the proposed findings of fact and conclusions of law submitted by the Respondent. *In re Who's Who Worldwide Registry, Inc.* 232 B.R. 38, 48 (E.D.N.Y 1999)(quoting *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-57, 84 S. Ct. 1044, 1047, 12 L. Ed. 2d 12 (1964)). Moreover, the decisions below set dangerous precedent by which aggressive bankruptcy trustees may include jointly owned property in one spouse's bankruptcy estate and eliminate any claim by a non-debtor spouse for her interest in the property.

1. Respondent's characterization of the various stages of the proceedings in this extensive case is misleading and incorrect. *Gurley I,* as defined by Respondent, was not "Mrs. Gurley's first litigation of her interest in assets that are part of the Debtor's estate." Opp. at 5. *Gurley I* was a "Complaint Seeking to Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b)." App. 7a. Respondent's loose assertion that this was Mrs. Gurley's litigation is wholly inaccurate and misleading. Notwithstanding that the litigation in *Gurley I* did not directly involve Mrs. Gurley's interest in assets (rather it involved the question of whether *Mr.* Gurley held *any* legal or equitable interest by virtue of *his* interest in the property), Mrs. Gurley's claim could not have arisen until after the transfers were set aside and the value of

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Memphis Bankruptcy Court. That "under section 502(h), B.J. Gurley [Mrs. Gurley], as the recipient of a fraudulent transfer who is forced to surrender the property by virtue of the Orlando Bankruptcy Court's judgment ***has the right to file a claim*** *against W.M. Gurley's estate.*" *Id.* at 22 (emphasis added). Remarkably, the Trustee even went so far as to point out to the Memphis Bankruptcy Court that "[t]he fact that a fraudulent transferee may file a proof of claim in the transferor's bankruptcy court is found in several authorities." *Id.* at 21.

the transfers was returned to the estate. 11 U.S.C. § 502(d). *In re Republic Trust & Sav. Co.*, 897 Fd.2d 1041, 1045-46 (10th Cir. 1990) *cert. denied by Hackler v. Langenkamp,* 498 U.S. 896, 111 S. Ct. 245, 112 L. Ed.2d 204, and *cert. granted, jmt. rev'd by Langenkamp v. Culp,* 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed.2d 343 (1990) (reversed on other grounds) (stating "appellants cannot possibly become creditors of the estates until after the conclusion of the adversary proceedings [to avoid transfers] against them."). *Id.* at 1046 n.4.

Gurley II, as defined by Respondent, was not "Mrs. Gurley's second litigation of the value of her interest in the assets which the Florida Bankruptcy Court ruled were part of Mr. Gurley's estate." Opp. at 6. Rather, *Gurley II* was the litigation in the Tennessee Bankruptcy Court which, as conceded by Respondent, found that "every asset listed in the Florida Bankruptcy Court's Order of September 16, 1997, was included in Mrs. Gurley's bankruptcy estate." Opp. at 5 (bold in original omitted). No valuation was conducted in *Gurley II* but it is undeniable that the Tennessee Bankruptcy Court found that Mrs. Gurley had a "legal or equitable interest" in the assets. *In re Gurley,* 222 B.R. 124, 145 (Bankr. W.D. Tenn. 1998). *Gurley II* affirmed the existence of Mrs. Gurley's interest in all the assets but recognized the Florida Court's Amended Judgment as a claim against her. Subsequent to *Gurley II*, the Tennessee Bankruptcy Court conducted a valuation hearing and it properly valued the ***entire*** properties which were the subject of the Florida Bankruptcy Court's Amended Judgment. No separate value was assigned to Mrs. Gurley's interest in these assets, for to do so would have been tantamount to the Tennessee Bankruptcy Court allowing a claim in the Florida Bankruptcy Court—clearly an incongruous result.

Respondent's characterization of *Gurley III,* as an attempt to reclaim "that which has been finally and irrevocably determined to belong to her widower's estate" is a deceptive

statement at best. Mrs. Gurley is not attempting to reclaim the assets included in her husband's estate. To the contrary, Mrs. Gurley is simply asserting a claim under section 502(h) for the value of ***her*** independent ownership interest in property which was included in and which she returned to her husband's estate and about which there exit genuine issues of material fact.

2. The lower courts' holdings are in no way consistent with this Court's decisions in *Archer Moitie*, and *Brown* and, in fact, cut squarely against the spirit of these decisions on res judicata in bankruptcy cases. Rather than addressing the substantive policy arguments considered by this Court in *Archer* and *Brown*, Respondent characterizes these important decisions as being factual dissimilar and somehow limited to their facts. Virtually identical policy implications exist here. For example, res judicata does not serve the orderly process of justice nor does it free the courts to resolve other disputes in the allowance of claims under section 502(h) because requiring a litigant in a transfer avoidance action to simultaneously litigate the allowance of her claim needlessly increases the time and cost associated with avoidance litigation. Similarly, in transfer avoidance actions persons "cannot possibly become creditors of the estate until after the conclusion of the adversary proceedings [to avoid transfers] against them. *In re Republic Trust & Sav. Co.*, 897 Fd.2d 1041, 1046 (10th Cir. 1990). Thus, it is always premature to address allowance of claims before the conclusion of the transfer avoidance stage.

Respondent's argument that confirmation of Mrs. Gurley's plan is res judicata as to the allowance of her claim is similarly flawed. This Court has held that orders confirming plans of reorganization are entitled to res judicata effect (*Stoll v. Gottlieb,* 305 U.S. 165, 59 S. Ct. 134, 83 L.Ed. 104 (1938), *reh. denied*, 305 U.S. 675, 59 S. Ct. 250, 83 L.Ed. 437 (1938)); however, the fallacy of Respondent's argument is his presupposition that the Plan in Mrs. Gurley's chapter 11 case

in the Tennessee Bankruptcy Court foreclosed her pursuit of her claim. It did not.

First, Mrs. Gurley expressly preserved the right to continue to pursue her claims against her husband's bankruptcy estate in her Third Amended Plan of Reorganization (the "Plan"). The Plan vested all property of the estate (including Mrs. Gurley's claims against her husband's estate) in Mrs. Gurley. Plan at Section 8. C. Respondent was fully aware of the existence of the claims against the Debtor's estate which is most aptly demonstrated by the fact that (i) the claim was filed on October 16, 1997, nearly one full year prior to confirmation; and (ii) Respondent objected to the claim on April 24, 1998, several months before confirmation of the Plan. Additionally, the claim unmistakably states that it is a "claim under § 502(h)."

Secondly, Respondent's contention that res judicata applies because Mrs. Gurley "should have and could have raised the issue of the value of her interest in the assets at the time the Tennessee Bankruptcy Court was considering the value of the Trustee's interest in the assets" (Opp. at 10) is nonsensical because it purports to confer jurisdiction to the Tennessee Bankruptcy Court over the claims allowance process in the Florida Bankruptcy Court. Respondent ignores the fact that the Plan did not purport to address the allowance of her pending claim against her husband's estate but simply provided for payment of the value of the assets recovered by the Respondent under section 550. The Tennessee Bankruptcy Court did not and could not attempt to address the allowance of a claim in another bankruptcy case pending in another court. Thus, Respondent's suggestion that Mrs. Gurley failed to obtain allowance of her claim in the Tennessee Bankruptcy Court or through an appeal of the Tennessee Bankruptcy Courts' decisions is meritless.

Finally, Respondent does not seriously dispute that the lower courts have ignored the decisions of the Tennessee

Bankruptcy Court which determined that Mrs. Gurley in fact held an interest in the assets independent of that which was transferred because he cannot. The Tennessee Bankruptcy Court held that Mrs. Gurley held an interest in all the assets subject to the Florida Bankruptcy Court's amended judgment and that her interest was property of her chapter 11 estate. *In re Gurley*, 222 B.R. at 130. How can this interest, recognized by the Tennessee Bankruptcy Court, have no value? How can this interest be ignored in evaluating the existence of a claim against the Debtor's estate?

Respondent likewise does not contest that Mrs. Gurley held interests in the properties in question. This capitulation is evidenced by his failure to respond in any fashion to Petitioner's extensive analysis of her interest in the numerous pieces of real property located in Tennessee (Pet. at 15-20). Respondent, for example, does not contest (i) that the properties were acquired; (ii) the dates of the acquisitions; or (iii) that the properties were acquired and owned as tenants-by-the-entirety (for as many as twenty (20) years in some cases). These facts, coupled with Respondent's acknowledgment that Mrs. Gurley would have had a claim even if her appeal of the fraudulent transfer action been successful, are clear indications that Mrs. Gurley held interests in property which have been included in her husband's bankruptcy estate and for which she has not been compensated.

There are genuine factual disputes that exist concerning the value of Mrs. Gurley's entireties interest on the petition date which no court has ever resolved and which dictate reversal of the lower courts' orders granting summary judgment in favor of Respondent. The lower courts' incorrect application of the doctrine of res judicata to avoid addressing these admittedly difficult issues is in conflict with this Court's teachings in *Brown* and *Archer* and the Petition should be granted to correct this error. This issue is undoubtedly important to Petitioner; however, its implications are considerably

broader in scope. Left unchecked the lower courts will be free to avoid addressing the allowance of claims of transferee creditors by simply holding that transferees should have litigated the allowance of their claims together with their defense of the avoidance action. This result is clearly not countenanced by the Bankruptcy Code and fails to satisfy the policy goals of res judicata.

3. Respondent contends that the lower courts' interpretations are "consistent with the plain language of the statute." Opp. at 11. This is argument is demonstrably wrong. The plain language of 11 U.S.C. § 502(h) clearly and unambiguously supports allowance of Mrs. Gurley's claim. The plain language of section 502(h) states that claims arising from recovery of property under section 550 are to be allowed or disallowed as if such claim had arisen prepetition. 11 U.S.C. § 502(h). Section 550, provides that, to extent a transfer is avoided under sections 544, 545, 548, 549, 553(b) or 724(a), the trustee may recover the value of the property from certain transferees. 11 U.S.C. § 550. Mrs. Gurley was the recipient of transfers that were avoided under 11 U.S.C. § 544(b), and which transfers were recovered from her under section 550. Thus, having returned the value of the entire property transferred (not simply the value of Mr. Gurley's interest as suggested by Respondent), she is entitled to a claim for the value of her independent ownership interest in the property.

Respondent relies heavily on the *In re Toy King Distr., Inc.*, 256 B.R. 1 (Bankr. M.D. Fla. 2000), decision, for his argument that section 502(h) claims arise only when the claimant is required to disgorge a payment made to satisfy a valid prepetition obligation. Opp. at 14. *Toy King* itself and others recognize that recipients of fraudulent transfers may be entitled to assert claims under § 502(h). In *Toy King*, the court states a "subsequent transferee is authorized under § 502(h) to pursue a claim against the bankruptcy estate the

same as if such claim had arisen before the date of the filing of the petition" and "[t]o pursue such a claim against the debtor, however, the subsequent transferee must be a creditor of the debtor or be able to assert a claim against the debtor under principles of common law." *Id.* at 204 (quoting *Southmark Corp. v. Schulte, Roth & Zabel, L.L.P. (In re Southmark Corp.)*, 242 B.R. 330, 341 (N.D.Tex.1999)). Similarly, in *In re Best Prods. Co., Inc.*, 168 B.R. 35 (Bankr. S.D.N.Y. 1994), a case involving a fraudulent transfer in a Leveraged Buy Out transaction, the court held "[t]here is an implication in section 550 that a transferee of a fraudulent transfer will have a claim when the transfer is disgorged." *Id.* at 58.

By analogy here, Mrs. Gurley's existing interests in the properties represent consideration given at the time of the acquisition of the property and thus a claim "allowable so long as [she] satisfied the judgment arising out of the fraudulent transfer action." 168 B.R. at 58. This fact is bolstered by Respondent's admission in the brief in opposition that "[h]ad the appellate courts reversed all or part of the Florida Bankruptcy Court's decision, Mrs. Gurley would clearly have had a meritorious claim in the Debtor's estate." (Opp at 7). This statement is an outright admission by Respondent that Mrs. Gurley held a prepetition claim against the Debtor, because it recognizes that she was a creditor and was able to assert a claim against the Debtor as a result of her interest in all these assets irrespective of the portion found to have been fraudulently transferred to her. Opp. at 7.

Respondent similarly contends that section 502(h) applies only to recipients of preferential transfers which are recovered under 11 U.S.C. § 547(b). Opp. 12. A brief look at the evolution of section 502(h) unequivocally demonstrates the Congress' intent to include recipients of fraudulent transfers and preferential transferees in the provisions of

section 502(h). This unambiguous intent is shown by the fact that the Congress consciously chose to expand the provisions of section 502(h) in the final version of the 1978 Code. For example, section 502(h) as originally proposed in the Senate in S. 2266 and in the House in H.R. 8200 provided as follows:

> (h) A claim arising from the recovery of property under section 550 of this title as a result of the avoidance under section 547 of this title of a setoff shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

S. 2266, 95th CONG. 1st SESS. (Oct. 31, 1977)(§ 502(h)); H.R. 8200, 95th CONG. 2nd SESS. (Feb. 8, 1978)(§ 502(h))

As noted above, the final version of H.R. 8200 as enacted provided as follows:

> (h) A claim arising from the recovery of property under section 522(i),[3] 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. § 502(h) (App. at 58a).

The Congress' intent in modifying section 502(h) prior to enactment is expressed in the legislative history which states that "[s]ection 502(h) of the House amendment ***expands*** similar provisions contained in the Senate amendment to indicate that ***any*** claim arising from recovery of property under section 522(i), 550, or 553 shall be determined as though it

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[3] The Congress amended section 502(h) in 1984. Sec. 445(e) of BAFJA provides "Section 502(h) of title 11 of the United States Code is amended by striking out '522(i)' and inserting in lieu thereof '522'." Pub. L. No. 98-353 Title III, § 445(e), July 10, 1984, 98 Stat. 333.

were a prepetition claim." 124 CONG. REC. H11089 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6450 (Sept. 28, 1978) and 124 CONG. REC. S17406 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6518 (Oct. 6, 1978)(emphases added).

Notably, the Congress revisited section 502(h) in 1984 where it amended the language clarifying its application to transfers avoided under 522. *See* n. 3 *supra.* Clearly, the Congress knows what section 502(h) provides and its language is clear. Claims arising from recovery of property under section 550 shall be allowed or disallowed the same as if the claim had arisen before the petition date. Mrs. Gurley's claim is such a claim and the lower courts erred in ignoring this plain language and intent and incorrectly limiting application of 502(h) solely to preference claims.

* * * *

The petition presents a clear case of a court of appeals which has decided an important question of federal bankruptcy law that (i) on the issue of res judicata, conflicts with this Courts' prior decisions and (ii) on the issue of the allowance of a claim under 11 U.S.C. § 502(h), has not been, but should be, settled by this Court. Accordingly, the Court should grant the petition.

CONCLUSION

For the reasons stated herein and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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